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2020 STATE OF COLORADO DISPARITY STUDY Final Report



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EXECUTIVE SUMMARY.

2020 State of Colorado Disparity Study

Keen Independent Research LLC

The State of Colorado seeks to ensure that there is a level playing field for historically disadvantaged businesses to compete for State contracts. Because it had never examined equity in its contracts statewide, in 2019, the Legislature authorized a study of the utilization and availability of Historically Underutilized Businesses (HUBs) regarding State contracts. Senate Bill 19-135 defined HUBs to be businesses owned by people of color, women, persons with physical or mental disabilities and members of the LGBT community.

In January 2020, the State engaged Keen Independent Research LLC (Keen Independent) to conduct this disparity study. Keen Independent prepared a 700+ page report documenting methodology, results and recommendations. The Executive Summary includes:

- A. Background on the study;
- B. Quantitative and qualitative information for the Colorado marketplace;
- C. Disparity analysis for State contracts;
- D. Conclusions; and
- E. Recommendations.

A. Background on the Study

The legal framework for the study and programs operated by the State are summarized below.

Legal framework for the disparity study. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to create and operate Minority Business Enterprise (MBE) programs or any other initiatives benefitting a group based on race. Legal restrictions also apply to gender-conscious measures such as Women Business Enterprise (WBE) programs. State and local governments that have successfully defended these types of programs often have disparity studies and other evidence supporting the need for such efforts. Successful defense of the City and County of Denver program is one example.

Different legal standards pertain to programs that base eligibility on factors other than race or gender. If legally challenged, state and local governments with procurement equity programs focusing on small businesses or companies owned by persons with disabilities, for example, need only show that the law authorizing those preferences is rationally related to a legitimate government interest. (Chapter 2 and Appendix B of the report discuss the legal framework in detail, including analysis of U.S. Supreme Court decisions and other cases.)

Current programs operated by the State. As discussed later in this Executive Summary, the State currently operates programs that provide preferences based on business size or ownership by specific groups, but they are limited in scope.

Disparity study research activities. The Keen Independent study team began work in January 2020 and completed a draft report in November 2020. Local team members included Taloma Partners and CREA Results in Denver; Combs Communication in Aurora; and Distel Consulting in Grand Junction. Team members from outside Colorado were Holland & Knight, Customer Research International and Donaldson Consulting.

State contracts and subcontracts. The legislation authorizing the study required examination of State procurements between July 1, 2014 and June 30, 2018 for all State executive agencies and community colleges except for the institutions of higher education that have opted out of the State Procurement Code. The judicial and legislative branches of State government are also outside the scope of the study.

Keen Independent examined data from State procurement information systems to identify contracts and subcontracts awarded within the study period. Keen Independent also reached out to prime contractors to secure additional subcontract information. In total, Keen Independent analyzed 21,588 contracts and subcontracts totaling \$3.2 billion.

Relevant geographic market area. Not including purchases state governments typically make from national markets, 83 percent of State contract dollars went to firms with locations in Colorado. Therefore, Keen Independent focused on firms in Colorado when performing the marketplace and availability analyses in the disparity study.

Analysis of marketplace conditions. The study team compiled and analyzed quantitative information about outcomes for people of color, women and persons with disabilities in Colorado and the businesses owned by those groups. There was little available information on LGBT-owned businesses in Colorado, however.

The study team conducted in-depth interviews with business owners and trade association representatives across Colorado. Interviews included business owners of color, women, persons with disabilities and members of the LGBT community. Additional business owners answered questions about marketplace barriers in the study team's availability survey. Overall, Keen Independent obtained input from more than 700 business owners, trade association representatives, focus group participants and others providing qualitative information.

Nearly all business owners indicated to the study team that they had been impacted by the COVID-19 pandemic. However, the interviews, focus groups and surveys primarily concentrated on long-term conditions in the marketplace and experiences with State contracts.

Availability, utilization and disparity analyses. Disparity analyses for a state or local government compare the percentage of that organization's contract dollars going to different groups of firms with what might be anticipated given the relative availability of those groups for those contracts.

- Data for the availability analysis came from Keen Independent's online and telephone surveys that reached thousands of companies in Colorado. Firms were asked about their qualifications and interest in contracts with the State and their availability for different types, sizes and locations of prime contracts and subcontracts.

- After completing surveys with 17,052 businesses in Colorado, the study team developed a database of 2,140 businesses reporting that they were available for specific types of State contracts and subcontracts. Of those businesses:
 - 17 percent were minority-owned (MBEs);
 - 20 percent were white women-owned (WBEs);
 - 6 percent were owned by persons with disabilities; and
 - Less than 1 percent were LGBT-certified.

Note that a firm could be minority or white woman-owned *and* be owned by a person with a disability *and* be LGBT-certified, which is why there were three separate disparity analyses when examining these groups.

- Keen Independent then determined the availability of HUBs and other businesses for each of the more than 21,000 State procurements examined in the study (including subcontracts). For some procurements, HUBs were a relatively large percentage of total firms available. There were other contracts for which only a few firms were available and none were HUBs. Keen Independent combined the results of these contract-by-contract availability analyses to calculate overall availability benchmarks for each HUB group.

Based on this availability analysis, one might expect MBE/WBEs to have received about 28 percent of State contract dollars during the study period. The dollar-weighted availability figure was 12 percent for businesses owned by persons with disabilities and 0.02 percent for LGBT-certified businesses.

Keen Independent compared the share of contract dollars going to MBEs (by racial and ethnic group), WBEs, firms owned by persons with disabilities, and LGBT-certified firms (“utilization”) with what might be expected for each group based on the availability analysis.

Public participation in the study. The State and Keen Independent implemented an extensive public participation process as part of the study. These activities included:

- An External Stakeholder Group and an Internal Stakeholder Group that met with the study team throughout the project.
- Distribution of information to more than 20,000 businesses and other groups.
- A website, telephone hotline and email address for anyone wishing to comment.
- Email and telephone surveys that reached more than 17,000 companies.
- In-depth personal interviews and focus groups with more than 100 business owners, trade association representatives and others.

Because of the COVID-19 pandemic, interviews and meetings from mid-March 2020 through the end of the study were held virtually. The pandemic did not negatively affect the comprehensiveness of the study.

B. Quantitative and Qualitative Information for the Colorado Marketplace

Keen Independent examined marketplace conditions based on U.S. Census data, survey information, in-depth interviews, focus groups and other sources.

Marketplace conditions for minority- and women-owned businesses. There is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women- owned businesses in the Colorado construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment industries. This includes evidence of unequal opportunities to:

- Enter and advance as employees within certain industries;
- Start and operate businesses; and
- Obtain financing and bonding to start, operate and expand their businesses.

Business outcomes also differed for MBE/WBEs compared with majority-owned companies, including disparities in total business revenue.

Results for businesses owned by persons with disabilities. Persons with disabilities in Colorado are less likely than other groups to own businesses in the study industries. There is also evidence that persons with disabilities who own businesses earn less than other business owners.

Results for LGBT-certified firms. There was very limited information available regarding members of the LGBT community — there were no data on employment outcomes for LGBT individuals and there was no information about members of the LGBT community in U.S. Census Bureau data — however, qualitative evidence indicated that members of the LGBT community experience unequal treatment, negative stereotypes and other forms of discrimination in the Colorado marketplace.

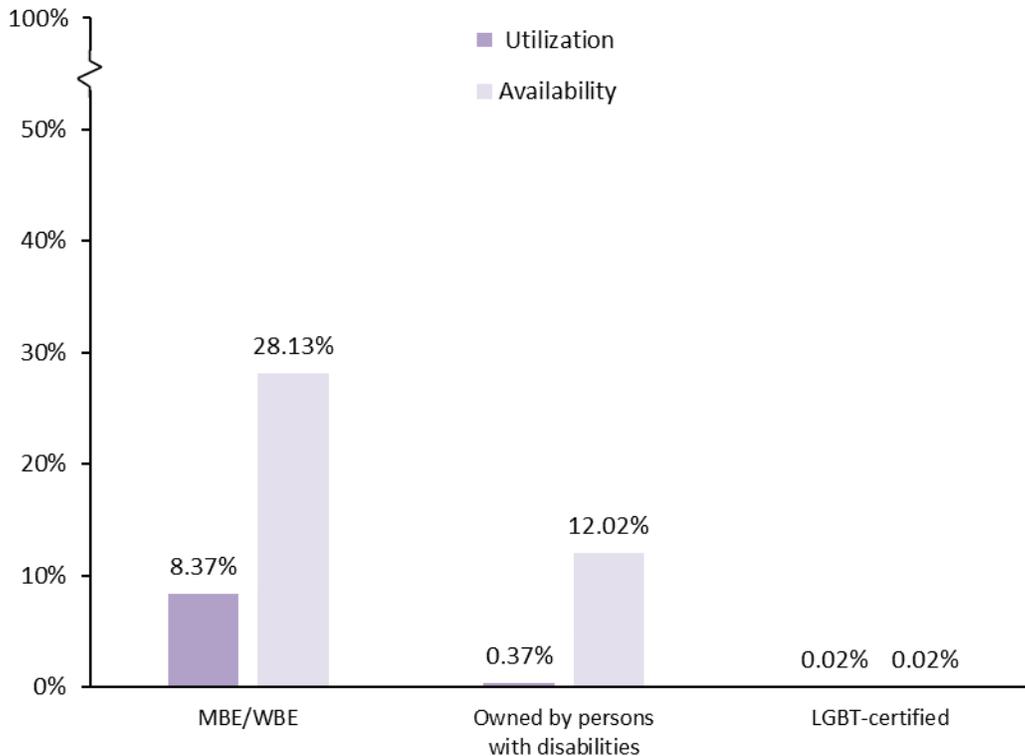
C. Disparity Analysis for State Contracts

Results for minority- and women-owned firms, firms owned by persons with disabilities businesses and LGBT-certified firms are presented below in Figure ES-1.

- Minority- and women-owned businesses received about 8 percent of State contract dollars, below the 28 percent expected from the availability analysis.
- Utilization of firms owned by persons with disabilities was less than 1 percent of contract dollars. This was also below availability of those businesses for this work (12%).
- A very small percentage of contract dollars went to LGBT-certified firms (0.02%), but because a very small number of firms in the availability analysis were LGBT-certified, that utilization is comparable to the availability benchmark for LGBT-certified companies. (This result would be different if there were data for all firms owned by members of the LGBT community.)

Figure ES-1.

Utilization and availability of MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified businesses in State of Colorado procurements, July 2014–June 2018



Source: Keen Independent Research utilization and availability analyses for State contracts.

Disparity indices. The study team compared utilization and availability results using a “disparity index,” which is calculated by dividing utilization by availability and multiplying by 100 (“100” is parity).

The disparity index for MBE/WBE utilization in State procurement is 30 (8.37% divided by 28.13%, multiplied by 100). Because the index is below 80, the disparity is “substantial,” according to guidance from the courts.

Figure ES-2 shows utilization, availability and disparity results for MBEs (by group) as well as white women-owned firms, firms owned by persons with disabilities and LGBT-certified firms.

Note that utilization and availability were both very low for LGBT-certified companies and would be higher if there were better data on non-certified firms owned by members of the LGBT community. (The disparity index is “107” because the calculation was made with results going out additional decimal places.)

Figure ES-2.

Disparity analysis for State procurements, July 2014–June 2018

	Utilization	Availability	Disparity index
African American-owned	0.36 %	5.66 %	6
Asian American-owned	2.87	2.13	135
Hispanic American-owned	1.75	5.37	33
Native American-owned	0.11	2.93	4
Total MBE	5.09 %	16.09 %	32
WBE (white women-owned)	3.28	12.04	27
Total MBE/WBE	8.37 %	28.13 %	30
Owned by persons with disabilities	0.37 %	12.02 %	3
LGBT-certified	0.02	0.02	107

Note: Disparity index = 100 x Utilization/Availability.
Results rounded to the nearest one-hundredth of a percent, but disparity indices calculated using utilization and availability results that were not rounded.

Source: Keen Independent Research utilization and availability analyses for State contracts.

Summary of disparity results by industry. Finally, Keen Independent examined utilization and availability for each group for each of the industries specified in the State’s authorization of the disparity study: construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment contracts.

Results for State construction, construction-related professional services, other professional services, goods and other services contracts. In each of these industries, there was a substantial disparity between utilization and availability for firms owned by:

- African Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Utilization of Asian American-owned firms exceeded what was expected from the availability analyses for construction, construction-related professional services, goods and other services contracts. There was a substantial disparity for Asian American-owned firms for other professional services contracts.

Brokerage and investment. For State brokerage and investment contracts, there were substantial disparities between utilization and availability of:

- African American-, Hispanic American- and Native American-owned businesses; and
- White women-owned firms.

D. Conclusions

Keen Independent concludes the following based on the combined study information:

1. The State is already helping small businesses, including diverse businesses, but with limited tools and resources.
2. Based on the evidence examined in this study, there is not a level playing field in Colorado for businesses for certain groups.
3. Without further action, disparities in participation of diverse businesses will likely persist.
4. With legislation and resources, disparities can be narrowed or eliminated.
5. Addressing disparities needs to be a multi-year, phased effort.

1. The State is already helping small businesses, including diverse businesses, but with limited tools and resources. For many years, the State has reached out to diverse businesses and other small businesses to help companies learn about and bid on its contracts and subcontracts. It also provides information on available technical assistance.

In the past three years, the State worked with stakeholders to modernize its State Procurement Code and supporting rules to increase flexibility and transparency in its procurement. In August 2020, Governor Polis Executive Order D 2020 175 directed DPA and other agencies to review and dismantle barriers in procurement, including those identified as part of the disparity study.

The State assists diverse businesses through the other initiatives as well.

- The Colorado Department of Transportation (CDOT) operates the Federal Disadvantaged Business Enterprise (DBE) Program on its U.S. Department of Transportation-funded contracts. In addition to providing supportive services to DBEs, CDOT sets DBE contract goals on certain contracts.
- CDOT's Policy Directive 606.0 "Policy on Fostering Small Business Capacity" (March 23, 2018) includes tailoring and incentivizing contracts to encourage small business participation in CDOT contracts. CDOT's Emerging Small Business (ESB) Program is one element. CDOT-certified ESBs are eligible for evaluation points in point-based contract selections, financial incentives in cost-based contract selections and mentor-protégé programs. CDOT can identify contracts for which it will only solicit bids or proposals from ESBs.
- The State has set an overall goal that at least 3 percent of all contract dollars be awarded to service-disabled veteran-owned small businesses (SDVOSBs) (CRS 24-103-905). The State can use preferences to encourage participation of SDVOSBs.
- Finally, the State has a Disability Set Aside program that encourages purchases from non-profit agencies employing persons with severe disabilities. (C.R.S. 24-103-801).

Programs operated by some states increase the participation of diverse businesses in their contracts to levels much higher than found for the State of Colorado. They use the following tools:

- Contract goals;
- Price or point preferences; and
- Sheltered market or restrictive bidding programs.

5. Addressing disparities needs to be a multi-year, phased effort. Finally, Keen Independent concludes that any State actions to address identified disparities must be part of a sustained, multi-year effort.

- It will take time for the State to put all the needed tools in place.
- The State has decentralized procurement (as do many other states), which might slow implementation of new programs.
- The State's procurement functions must continue to operate while making any changes.
- Building a vendor base of diverse firms and certification of those firms for any new programs occurs over years, not months.
- Some of the diverse firms that might eventually be involved in State contracts and subcontracts are not fully ready to compete for this work.
- CDOT's experience with its ESB Program shows that new programs take time to launch, refine and become effective.

E. Recommendations

Keen Independent recommends that the State authorize and implement a multi-part program to assist socially and economically disadvantaged businesses for the types of contracts and State agencies examined in this study.

Overall recommendations. Keen Independent recommends that the Legislature authorize and fund a program addressing the disadvantages for diverse firms identified in this study.

1. Establish policy and overall annual aspirational goals for eligible contracts;
2. Remove barriers to small business participation;
3. Work with partners to increase the readiness of diverse businesses for State contracts;
4. Authorize and implement new equity tools in State procurement; and
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement.

Figure ES-4 summarizes examples of initiatives the State might consider in pursuing these objectives. Chapter 8 discusses each recommendation in further detail.

Figure ES-4.
Recommended contract equity program for the State of Colorado

Recommendations
1. Establish policy and overall annual aspirational goals for eligible contracts
<ul style="list-style-type: none"> a. Set separate annual statewide goals for the utilization of the following four groups: MBEs, WBEs, businesses owned by persons with disabilities and firms owned by members of the LGBT community b. Set department-specific goals for all diverse businesses combined c. Implement systems to track and report progress in reaching these goals d. Develop new certification system
2. Remove barriers to small business participation
<ul style="list-style-type: none"> a. Increase the threshold when it requires bid, payment and performance bonds for its contracts b. Address any overly restrictive insurance requirements c. Ensure that evaluation criteria used in qualifications-based awards do not have unintended negative effects on smaller or newer businesses d. Consolidate and simplify the process to register as a potential bidder e. Reach out to expand the number of diverse businesses registered with the State f. Consistently require prime contractors to identify the subcontractors they use on State contracts g. Expand CDOT's subcontractor payment notifications system to other departments
3. Work with partners to increase the readiness of diverse businesses for State contracts
<ul style="list-style-type: none"> a. Continue to partner with others to provide business assistance b. Provide real-time training on how to win and perform State contracts and subcontracts c. Partner with others to provide training and resources for business insurance d. Create bonding assistance program e. Create working capital program for diverse businesses winning State contracts f. Expand CDOT's mentor-protégé program statewide
4. Authorize and implement new equity tools in State procurement
<ul style="list-style-type: none"> a. Implement a contract goals program b. Implement a sheltered market program c. Implement a price and evaluation preference program d. Regularly evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement
<ul style="list-style-type: none"> a. The legislative and judicial branches of the State and institutions of higher education that have not reviewed equity in their contracts should do so b. Local governments in Colorado should also review equity in their contracts

New equity tools in State procurement. Recommendation #4 in Figure ES-4 suggests that the State consider the following programs found in other states and used by CDOT and the City and County of Denver:

- Contract goals program;
- Sheltered market program; and
- Price and evaluation preference program.

a. Implement a contract goals program. CDOT operates contract goals programs for DBEs on its USDOT-funded contracts. It also can apply ESB goals for certain contracts. Prime contractors bidding on a contract with a goal must either include DBE or ESB participation at a level that meets the goal or show good faith efforts to do so. CDOT sets contract goals specific to each contract.

Based on its Uniform Reports, firms certified as DBEs received 12 percent of contract dollars on in its Federal Highway Administration-funded contracts for FFY 2013–FFY2017, much higher than found for all minority- and women-owned firms on other State construction contracts. Much of CDOT’s DBE participation came from DBE contract goals for those contracts.

The State should consider authorizing a contract goals program for large construction contracts and other contracts with meaningful subcontract opportunities and operate it like CDOT’s contract goals programs. Eligibility of firms for the program is discussed later in this Executive Summary.

b. Implement a sheltered market program. CDOT also operates a sheltered market program for ESBs on certain small contracts. The State should consider expanding a sheltered market program across its agencies. Under that program, the State would be allowed to limit its solicitation of bids and proposals for certain small contracts to certified firms.

- The State typically publicly advertises procurements of \$25,000 or more through its electronic procurement systems. For purchases under \$25,000, departments can directly make purchases without competition. The State might adopt a policy that staff first consider certified firms for those purchases (based on an electronic list of those firms).
- For purchases between \$25,000 and \$150,000, the State might consider operating the sheltered market program where it would seek competitive bids either from certified firms or all small businesses (if there is insufficient availability of certified businesses). Only eligible firms would receive solicitations to provide these quotes.

c. Implement a price and evaluation preference program. States such as Minnesota have a price or evaluation preference for certified firms, sometimes with a cap on the amount of price preference that can be considered. For the State of Minnesota, a certified firm is selected for an award if its price is within 6 percent of the low bidder unless the price difference exceeds \$60,000. The State of Minnesota can also give up to 6 out of 100 points to a proposer that is a certified firm on qualifications-based awards. Keen Independent’s 2017 Minnesota Joint Disparity Study determined that minority- and women-owned firms received 11 percent of State of Minnesota contract dollars (higher than the State of Colorado) even though availability of MBE/WBEs for State of Minnesota contracts was lower than for the State of Colorado.

The State of Colorado should consider authorizing a price and evaluation preference program. If it also implements a sheltered market program, the price and evaluation preference program might apply to procurements of \$150,000 or more.

d. Evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset. The State will need to decide the eligibility criteria for any contract goals, sheltered market or preference program based on the evidence in this report and other information available to the State. Participation in those programs would be limited to firms receiving certification that meet those criteria. For example, the State might consider a program for socially and economically disadvantaged businesses. Firms would need to meet criteria for both social and economic disadvantage to be certified, as explained below.

- **Social disadvantage.** Programs such as the City and County of Denver’s M/WBE program and the USDOT’s Federal DBE Program operated by CDOT certify firms for participation based in part on social disadvantage. In the Federal DBE Program and Denver’s program, firms that are owned by minorities and women have the rebuttable presumption of social disadvantage, but other firms can and do become certified as a DBE if they can show they are socially disadvantaged.

Given that broader definition, businesses that have been socially disadvantaged because they are owned by members of the LGBT community could be certified on a case-by-case basis if those firms can provide instances of such discrimination. Other firms facing social disadvantage could apply as well.

- **Economic disadvantage.** The second criterion for program participation is whether the firm is economically disadvantaged. A common measure is whether the firm is a small business under U.S. Small Business Administration (SBA) size standards for its industry. This is one of the criteria for economic disadvantage under the USDOT Federal DBE Program. Denver’s M/WBE program uses SBA size standards as well. CDOT’s ESB program has had a cap on revenue that is one-half of the SBA size limit, but is considering a new certification applying the full SBA small business standard.

Some programs also require that the company’s owner has personal net worth below a certain cap in order to be deemed to be economically disadvantaged. The USDOT Federal DBE Program currently has a \$1.32 million cap on the personal net worth of the business owner not including the value of the business or primary residence. Many state MBE/WBE programs do not include a cap on personal net worth.

Figure ES-5 on the following page summarizes results of the disparity analysis by industry for each group of businesses examined in the study. Based on whether or not there was a substantial disparity in State contracts (and considering other information in this study and outside the study), the State might choose to include a group of firms in an industry as socially disadvantaged based on their race, ethnicity, gender or other personal characteristics of the group.

Except for other professional services contracts, there was not a disparity in the utilization of Asian American-owned firms in State contracts. Therefore, the State might decide to not presumptively consider Asian American-owned companies in those other industries to be socially disadvantaged. Such firms could still apply for certification under the program but would need to demonstrate social disadvantage on an individual basis in their applications.

Each applicant for certification would also need to demonstrate economic disadvantage according to the standards set by the State, which might be as straightforward as being a small business (see the note “If small” in Figure ES-5).

Figure ES-5.
Implication of disparity results on presumptions of disadvantage

Industry and business ownership	Substantial disparity for State contracts	Presumption of disadvantage	
		Social disadvantage	Economic disadvantage
Construction, Construction-related professional services, Goods, Other services			
African Americans	Yes	Yes	If small
Asian Americans	No	Case-by-case	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Yes	Yes	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small
Other professional services			
African Americans	Yes	Yes	If small
Asian Americans	Yes	Yes	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Yes	Yes	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small
Brokerage and investment			
African Americans	Yes	Yes	If small
Asian Americans	Insufficient information	Case-by-case	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Insufficient information	Case-by-case	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small

Authorization, funding and sunset clause. Legislation authorizing a contract equity program should specify the types of additional tools that can be used in the procurement process, provide sufficient funding for a successful program and indicate a date that the program will expire unless it is reauthorized.

- Keen Independent recommends legislative authorization of the additional equity tools described in this report. The study team also recommends approval of additional staffing and other financial resources for program implementation, including new tracking systems and certification of firms.
- Federal courts have required a sunset clause for such equity programs. Programs can be reauthorized, but usually only based on updated disparity studies and other information about the marketplace. A future disparity study might indicate that certain programs are no longer needed or that stronger measures are warranted. States with programs often conduct disparity studies every four to five years to provide such information.

CHAPTER 1.

Introduction

Keen Independent Research LLC (Keen Independent) conducted the 2020 State of Colorado Disparity Study for the Executive Director of the Department of Personnel & Administration (DPA). The disparity study is mandated by Senate Bill 19-135 that took effect on July 1, 2019.

The study analyzes whether there is a level playing field for diverse businesses in the Colorado marketplace and in State procurement. SB 19-135 defines Historically Underutilized Businesses, or “HUBs,” to include businesses owned by people of color, women, persons with physical or mental disabilities, and members of the LGBT community. The study team examined conditions for HUBs in construction, construction-related professional services, brokerage and investment, other professional services, goods and other services industries.¹

The disparity study provides information about marketplace conditions and any disparities in State contracts, as well as insights from interviews, focus groups and surveys with businesses and others. The study encompasses contracts between July 1, 2014 and June 30, 2018 for each department of the executive branch of State government with the exception of the university systems that have opted out of the State Procurement Code.² The study began in January 2020 with a final report delivered in November 2020. The balance of Chapter 1:

- A. Introduces the study team;
- B. Outlines analyses conducted and where results appear in the final report; and
- C. Describes the public participation process throughout the study.

A. Study Team

Keen Independent Research is a national economic consulting firm with headquarters in Colorado. Principals David Keen and Annette Humm Keen directed this assignment. Mr. Keen has led more than 100 disparity studies.

Keith Wiener from Holland & Knight provided the legal framework as a subconsultant to Keen Independent. Mr. Keen and Mr. Wiener have helped public agencies successfully defend minority business enterprise programs in court.

Four Colorado-based firms performed work as subconsultants to Keen Independent on this study — Taloma Partners, Combs Communications, Distel Communications and CREA Results. These four team members are minority- and/or women-owned firms.

¹ Other services include services procured by the State that may be provided or performed without professional licensure or special education or training.

² The 2020 State of Colorado Disparity Study applies to all executive agencies and community colleges of the State as well as institutions of higher education that have not opted out of the State Procurement Code. Judicial and legislative branches of the State of Colorado are not included in the study.

Customer Research International (CRI) performed telephone surveys with firm owners and managers to collect information about their availability for State contracts and subcontracts. Donaldson Consulting performed in-depth interviews. Both of these firms are minority- and/or women-owned. Figure 1-1 lists each of the study team members and their responsibilities.

Figure 1-1.
2020 State of Colorado Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Denver, CO	David Keen Annette Humm Keen Principals	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener, Partner	Legal framework
Taloma Partners	Denver, CO	Maren Stewart, Principal	In-depth interviews
Combs Communications Partners	Aurora, CO	Marion Combs, CEO	In-depth interviews
Distel Consulting	Grand Junction, CO	Karla Distel, Sole Member	In-depth interviews
CREA Results	Denver, CO	Fernando Pineda-Reyes, CEO	In-depth interviews
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula, President	Availability surveys
Donaldson Consulting	Vancouver, WA	Suzanne Donaldson, CEO	In-depth interviews

B. Disparity Study Analyses and Organization of the Final Report

Keen Independent explains key study components in the next several pages. Figures 1-2 and 1-3 on pages 5 and 6 of this chapter summarize where results appear in the report.

Legal framework for the disparity study. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to create and operate Minority Business Enterprise (MBE) programs or any other initiatives benefitting a group based on race. Legal restrictions also apply to gender-conscious measures such as Women Business Enterprise (WBE) programs. State and local governments that have successfully defended these types of programs often have disparity studies and other evidence supporting the need for such efforts.

As explained in Chapter 2 and Appendix B, different legal standards pertain to programs that base eligibility on factors other than race or gender. If legally challenged, state and local governments with procurement programs focusing on small businesses or companies owned by persons with disabilities, for example, need only show that the law authorizing those preferences is rationally related to a legitimate government interest.

Current programs operated by the State. The State of Colorado currently operates the following programs that provide preferences based on business size or ownership by specific groups.

- **Federal DBE Program.** Because the Colorado Department of Transportation (CDOT) receives funds from the U.S. Department of Transportation, it is required to operate the Federal Disadvantaged Business Enterprise (DBE) Program related to its federally funded contracts. Firms that are socially and economically disadvantaged are eligible to be certified as DBEs under this federal program. Businesses owned by minorities or women are presumed to be socially disadvantaged, but other businesses can also be certified as DBEs. U.S. Small Business Administration size limits for small businesses as well as limits on the personal net worth of business owners are two of the criteria for determining economic disadvantage (49 CFR Part 26).
- **ESB Program.** CDOT also operates the Emerging Small Business (ESB) Program, which provides preferences for certified small businesses for certain state-funded construction and professional services contracts (2 C.C.R. 604-1-4).

To be eligible for the ESB program, the average annual gross receipts of the business cannot exceed one-half of the U.S. Small Business Administration's small business size standard for that industry.

No other State agency is currently authorized to operate this program.

- **SDVOSB preference.** The State has set an overall goal that at least 3 percent of all contract dollars be awarded to service-disabled veteran-owned small businesses (C.R.S. 24-103-905).

The State also operates a program that provides a preference to not-for-profit organizations that employ persons with disabilities (the Disability Set Aside program (C.R.S. 24-103-801).

Appendix K provides further information about these programs and other business assistance initiatives in Colorado.

State contracts and subcontracts. Departments within State government and the time period included in this disparity study were identified in SB 19-135.

- Keen Independent examined State procurements between July 1, 2014 and June 30, 2018.
- The study includes all State executive agencies and community colleges except for the institutions of higher education that have opted out of the State Procurement Code. The judicial and legislative branches of State government are also outside the scope of SB 19-135.

As explained in Chapter 3, Keen Independent examined data from State procurement systems to identify contracts and subcontracts awarded within the study period. Keen Independent also reached out to prime contractors to secure additional subcontract information. Appendix C describes the methods used to compile and analyze this information.

Marketplace conditions. The study team compiled and analyzed quantitative information about outcomes for people of color, women and persons with disabilities in Colorado, focusing on businesses owned by those groups. (There is little available information on LGBT-owned businesses in Colorado, however.) Chapter 4 summarizes results, and Appendices E through I provide supporting detail.

Study team members conducted in-depth interviews with business owners and trade association representatives in Colorado. Interviews included business owners of color, women, persons with disabilities and members of the LGBT community. Additional businesses answered questions about marketplace barriers in the study team's availability survey (discussed below). Chapter 4 also reviews these results. Appendix J provides a detailed reporting of representative comments from the more than 700 business owners, trade association representatives, focus group participants and others providing qualitative information.

Nearly all business owners indicated to the study team that they had been impacted by the COVID-19 pandemic and explained those effects as part of the study. However, the interviews, focus groups and surveys primarily concentrated on long-term conditions in the marketplace and experiences with State contracts.

Availability analysis. Disparity analyses for a state or local government compare the percentage of a that organization's contract dollars going to different groups of firms with what might be anticipated given the relative availability of those groups for that public agency's contracts and subcontracts. Data for the availability analysis came from the thousands of firms in Colorado that responded to Keen Independent's availability surveys. Firms were asked about their qualifications and interest in contracts with the State and their availability for different types, sizes and locations of prime contracts and subcontracts.

Chapter 5 presents the availability benchmarks for each industry for:

- MBEs, by racial and ethnic group;
- White women-owned firms (WBEs);
- Firms owned by persons with disabilities; and
- Businesses certified as LGBT-owned.

Appendix D describes the survey process and results.

Utilization and disparity analysis. Chapter 6 compares utilization of MBEs (by group), WBEs, firms owned by persons with disabilities, and LGBT-certified firms with the availability benchmarks described in Chapter 5. Chapter 6 includes statistical analysis of whether random chance in contract awards could explain any observed disparities. This chapter includes separate disparity analyses for construction, construction-related professional services, brokerage and investment, professional services, goods and other services procurements.

In Chapter 7, Keen Independent further explores whether neutral factors could explain any disparities in State procurement.

Summary of results and conclusions. In Chapter 8, Keen Independent summarizes information about conditions and outcomes for minority- and women-owned firms, businesses owned by persons with disabilities, and LGBT-certified companies. The study team then identifies actions for State consideration as it seeks to address any identified disparities.

Figure 1-2 outlines the chapters in the 2020 State of Colorado Disparity Study report.

Figure 1-2.
Chapters in 2020 State of Colorado Disparity Study final report

Report chapter	Description
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and organization of report
2. Legal Framework	Legal standards concerning programs for minority-owned firms, women-owned firms, and businesses owned by persons with disabilities and members of LGBT community
3. State Contracts and Subcontracts	How the study team compiled data about State contracts and subcontracts and the utilization of MBEs and WBEs and firms owned by persons with disabilities and LGBT-certified firms
4. Marketplace Conditions	Conditions for minorities and women, minority- and women-owned firms and businesses owned by persons with disabilities and members of the LGBT community
5. Availability Analysis	Results regarding relative availability of businesses owned by minorities, women, persons with disabilities and members of the LGBT community
6. Utilization and Disparity Analysis	Comparison of utilization and availability for minority- and women-owned businesses, firms owned by persons with disabilities and LGBT-certified firms
7. Further Exploration of HUB Utilization and Availability for State Contracts	Further examination of disparity results to determine if any disparities can be explained by neutral factors
8. Summary of Evidence and Program Recommendations	Synthesis of results and program recommendations

Figure 1-3 identifies the appendices included in the report.

Figure 1-3.

Appendices in 2020 State of Colorado Disparity Study final report

Report appendix	Description
A. Definition of Terms	Explanation of acronyms and terms used in the study
B. Legal Framework and Analysis	Detailed review of relevant court cases
C. Collection of State Contract Data	Methods used to compile and analyze contracts and subcontracts
D. Availability Data Collection	Methods used to compile and analyze data about availability of firms for State contracts
E. Entry and Advancement in the Colorado Marketplace	Quantitative analysis of any disparities in employment and advancement of minorities, women and persons with disabilities
F. Business Ownership in the Colorado Marketplace	Quantitative analysis of any disparities in business ownership
G. Access to Capital for Business Formation and Success	Quantitative analysis of any disparities in access to capital
H. Success of Businesses in the Colorado Marketplace	Quantitative analysis of any disparities in business success
I. Description of Data Sources for Marketplace Analyses	Documentation of sources for quantitative analyses of marketplace conditions
J. Qualitative Information from In-Depth Interviews, Availability Surveys and Other Comments	Analysis of in-depth interviews and other sources
K. Business Assistance Programs in Colorado	Existing programs for firms owned by minorities, women, persons with disabilities and members of LGBT community

C. Public Participation in the 2020 State of Colorado Disparity Study

The State and Keen Independent implemented an extensive public participation process as part of the study. These activities included:

- An External Stakeholder Group (ESG) that met with the study team throughout the project. The ESG included representatives of the business community and other groups that had an interest in State contracting and small business development. This group provided input on information sources, outreach efforts and program opportunities.
- An Internal Stakeholder Group (ISG) that also met with the study team during the project. Executive departments in State government were invited to participate. This group provided input on information sources, removing any barriers in the procurement process and program opportunities.
- Distribution of information to interested groups through press releases and emails to more than 20,000 businesses.
- A website with study information launched in early 2020.
- A telephone hotline and dedicated email address for anyone wishing to comment.
- Through electronic and telephone surveys, opportunities for company owners and managers to provide information about their businesses and any perceived barriers in the marketplace (the study team successfully contacted 17,000 businesses through these surveys).
- In-depth personal interviews and focus groups with more than 100 business owners, managers, trade association representatives and public sector procurement and project management staff.

Because the study was largely conducted during the COVID-19 pandemic, interviews, focus groups and meetings from mid-March 2020 through the end of the study were held virtually. The study team extended the time allocated for certain portions of the research, including the availability survey, to ensure maximum participation of Colorado businesses and other groups during the pandemic.

The COVID-19 pandemic did not negatively affect the comprehensiveness of the data collection or any other aspect of this study.

CHAPTER 2.

Legal Framework

Programs that give preferences in public procurement to businesses based on their characteristics or those of their owners can be legally challenged. Some programs are relatively easy to defend against some challenges and some are much harder depending on the factors used to determine eligibility for the program.

- Preferences to small businesses, veteran-owned businesses and companies owned by persons with disabilities can be challenged in court, but typically the public entity need only show that the law authorizing those preferences is rationally related to a legitimate government interest. This legal standard of review is known as the “rational basis test.” It is the most easily met threshold when evaluating the legality of a government contracting program.
- More stringent standards of legal review apply if a public agency considers the race, ethnicity or gender of a business owner when determining eligibility for a preference (known as “race-conscious” and “gender-conscious” programs).

Appendix B discusses how courts have evaluated the legality of race- and ethnicity-based programs, gender-conscious programs and other targeted business programs. This legal framework is briefly summarized below.

A. Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) Programs

Many state and local governments throughout the country adopted minority 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 enact and operate MBE programs or any other programs benefitting a group based on race or ethnicity.

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

1. A state or local government 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 state or local government must also ensure that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

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

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 state and local governments across the country discontinued MBE programs after the *Crosson* decision. Some then conducted disparity studies to determine if there was evidence supporting an MBE program that met this standard. Even if they have a compelling governmental interest for such programs, state and local governments can face legal challenges if they have not implemented those programs in a narrowly tailored way.

- **Compelling governmental interest.** Disparity studies examine whether there is a disparity between the utilization and availability of minority- and women-owned firms in an entity’s contracts, which is key information in determining whether there is evidence that race or gender discrimination affects a jurisdiction’s procurement. Because the U.S. Supreme Court held that a jurisdiction could take action if it had become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, disparity studies also examine local marketplace conditions.
- **Narrow tailoring.** There are a number of factors used to determine whether a program is narrowly tailored. They include consideration of whether workable “race-neutral measures,” such as small business programs, are sufficient to remedy the identified discrimination. A program must also be limited to those racial and ethnic groups identified as having suffered discrimination in the relevant marketplace.

Effect of the *Crosson* decision. Since 1989, states and local governments such as the City and County of Denver have faced lawsuits or threats of legal challenge regarding their minority and women business programs. Although not all states and local governments successfully defended their MBE/WBE programs, the Tenth Circuit Court of Appeals upheld the City and County of Denver’s program in *Concrete Works of Colorado, Inc. v. City and County of Denver*, as discussed in Appendix B.²

Intermediate scrutiny for gender-based programs. Legal restrictions also apply to gender-conscious programs. Some courts have applied an intermediate scrutiny standard when reviewing programs for women-owned firms. This standard has similar components to strict scrutiny but is more easily met. The Tenth Circuit Court of Appeals in *Concrete Works* recognized the intermediate scrutiny standard (see Appendix B).

B. Other Targeted Business Programs

A targeted business program can be legally challenged even if the program does not consider race, ethnicity or gender of the business owner. However, such programs are much more easily defended. The state or local government generally need only show that it has a “rational basis” for such a program, depending upon its components and how it is implemented.

² *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari).

Small business programs. Small business programs are those that consider eligibility and provide preferences to companies based on their annual revenue, number of employees, and/or other factors such as personal net worth of the business owner. CDOT's Emerging Small Business (ESB) program is an example of such a program.

As noted above, the rational basis legal standard might generally apply to such programs, which is more easily met than standards triggered for race- or gender-conscious programs.

Programs based on economic disadvantage, physical disability or veteran status. As with small business programs, a state or local government can face legal challenges concerning programs for firms located in economically disadvantaged areas (such as counties or empowerment zones), businesses owned by persons with disabilities, and companies owned by veterans. These programs can be reasonably expected to only satisfy the rational basis test for defensibility, depending on their components.

C. Local Business Programs

Local business programs seek to increase an entity's procurement dollars that go to companies with a primary place of business in a jurisdiction or are otherwise located within a jurisdiction. They might restrict bidding to local companies or provide preferences to local firms when evaluating bids and proposals. Local business programs might also set contract goals to encourage participation of locally owned subcontractors.

Although there are relatively few legal decisions related to such programs, they can raise constitutional issues that might rise to the strict scrutiny standard of judicial review (for example, if they require residency requirements as part of their program eligibility).

D. Programs Pertaining to Federally Funded Contracts

CDOT follows federal requirements to apply the Federal DBE Program for its contracts funded by the U.S. Department of Transportation. There have been legal challenges to federal programs, as explained in Appendix B of this report.³

In general, USDOT-funded contracts and other contracts involving federal preference programs are not part of the 2020 State of Colorado Disparity Study.

³ The U.S. Supreme Court decision in *Adarand Constructors, Inc. v. Peña* established the strict scrutiny standard of review for federal race-conscious programs. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

CHAPTER 3.

State Contracts and Subcontracts

Many components of the 2020 Disparity Study require State contract and subcontract data as building blocks for the analysis.¹ For example:

- Results concerning the State’s utilization of HUB firms are based on these data.
- Information about State procurements and firms receiving those purchases was used to identify the geographic area from which the State draws contractors and vendors and the types of work involved in State procurements. These results were needed before conducting the availability surveys with firms potentially available for State work.

There were many other uses of procurement data in this study as well.

Keen Independent collected data for State procurements for the July 1, 2014 through June 30, 2018 study period identified in the legislation authorizing the disparity study (Senate Bill 19-135). Chapter 3 describes the study team’s process for compiling these data in four parts:

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

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

A. Overview of State Contracts

Keen Independent obtained information about State contracts through data maintained by:

- Department of Personnel & Administration (DPA);²
- Colorado Community College System (CCCS);³ and
- Colorado Department of Transportation (CDOT).

¹ Note that the study team uses “procurements,” “purchases” and “contracts” interchangeably in this report.

² DPA database includes information for Department of Agriculture, Department of Corrections, Department of Education, Department of Higher Education, Department of Human Services, Department of Law, Department of Local Affairs, Department of Military Affairs, Department of Public Health and Environment, Department of Public Safety, Department of Revenue, Department of State, Department of Health Care Policy and Finance, Department of Labor and Employment, Department of Natural Resources, Department of Regulatory Agencies, Department of Treasury, Department of Personnel & Administration, and Office of the Governor.

³ CCCS database includes systemwide purchases and those for Arapahoe Community College, Colorado Northwestern Community College, Community College of Aurora, Community College of Denver, Front Range Community College, Lamar Community College, Morgan Community College, Northeastern Junior College, Otero Junior College, Pikes Peak Community College, Pueblo Community College, Red Rocks Community College and Trinidad State Colorado.

B. Collection and Analysis of State Contract Data

Figure 3-1 provides an overview of how Keen Independent developed data to determine the share of State procurement dollars going to different groups.

Keen Independent collected procurement data from different information systems:⁴

- CGI Advantage — Department of Personnel & Administration;
- Banner — Colorado Community College System; and
- SAP — Colorado Department of Transportation.

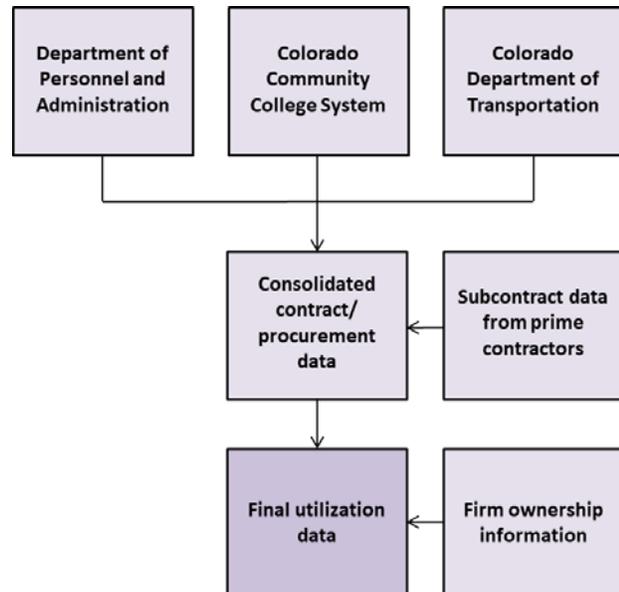
Keen Independent analyzed procurements with a minimum size of \$10,000 per year. The study team examined contracts paid with State funds and sought to exclude those using federal funds, as federal agencies often restrict how the State makes those purchases. State data sources provided information about award date, company receiving the procurement, dollars, and usually a description of the type of good purchased or work performed.

CDOT provided subcontract data for many of its large construction and large architecture and engineering (A&E) contracts, however CCCS and other departments do not centrally maintain these data. Some individual departments and colleges were able to provide subcontract data, and Keen Independent collected additional data directly from prime contractors and subcontractors working on large construction and A&E contracts. Appendix C further describes this process.

As shown at the bottom of Figure 3-1 and described in Appendix C, Keen Independent also developed information about the characteristics of firms receiving contracts and subcontracts, including the race, ethnicity, gender and disability status of the business owner and whether the firm was certified as owned by a person who is lesbian, gay, bisexual or transgender (LGBT).

- Some of these data on firm characteristics came from information reported by State contractors and vendors in the State’s vendor registration systems or directories.
- Most of the data on firm characteristics were compiled through additional research.

Figure 3-1.
Collection of State procurement data



⁴ CCCS provided purchase orders, CDOT provided purchase orders and contracts, and DPA provided the following types of procurements: contracts, purchase orders, delivery orders, master agreements and master agreements external and State price agreements.

CCCS and DPA identified procurements awarded during the study period, while CDOT provided data for procurements with expenditures during the study period.

Total procurements. From the consolidated procurement information, Keen Independent received data for \$15.5 billion of State procurements for the July 1, 2014 through June 30, 2018 study period.

Types of procurements not included in a disparity study. Some types of purchases are typically outside the scope of a disparity study as they relate to non-businesses, regulated utilities, federally funded contracts or other atypical services. Non-businesses are excluded as they have no “ownership”; the concept of whether they are minority- or majority-owned does not apply.

In addition, equipment and supplies typically purchased from a national market are not included as there are sometimes no local vendors available for such goods or services.

For the above reasons, the study team made certain exclusions for purchases from or related to:

- Government agencies (as vendors);
- Universities/colleges/schools (as vendors);
- Nonprofit organizations;
- Utilities (gas, electricity, internet, phone);
- Rental of buildings;
- Rental of land/real estate purchase;
- Rental of office equipment;
- Radio/TV/newspapers/magazines (as place of advertisement);
- Hospitality (hotels, restaurants);
- Dues and memberships;
- Non-custom computer software (e.g., Microsoft, Adobe); and
- Purchases from national markets (which for the State during the study period included books, communications, video and security equipment supplies, computer equipment, industrial equipment and machinery, laboratory equipment, medical equipment, office equipment, pharmaceuticals, police equipment and supplies, school supplies, medical services, law enforcement equipment and supplies, paint and related products, aircraft rental and helicopter services).

For each contract, the study team separated the contract dollars going to subcontractors from the dollars retained by the prime contractor (or subconsultants from the prime consultant on construction-related professional services contracts). Keen Independent calculated the total dollars retained by the prime contractor by subtracting subcontract dollars from the total contract value. Appendix C discusses these data in more detail.

Coding the type of construction, good or service provided. The study team coded the primary type of work or goods provided in each procurement based upon data in the DPA, CCCS and CDOT procurement records.

- Keen Independent translated commodity codes utilized in each procurement system into 8-digit subindustry codes developed by Dun & Bradstreet, which are based on the federal Standard Industrial Classification (SIC) system.
- Keen Independent also reviewed any descriptions of the goods or services identified in the procurement data.
- Sometimes the information in the State’s data was insufficient to identify the type of goods or work involved in a procurement. In those instances, the study team collected information about the vendor and the types of goods or services it typically supplies.
- Sometimes a contract involved multiple types of work. Keen Independent coded those procurements based on what appeared to be the predominant type of work in the contract. When a more specialized activity could not be identified as the primary area of work, these contracts were classified as “other” under one of the six study industries.

C. Types of Work Involved in State Contracts

After consolidating the procurement data and making necessary exclusions, there was a total of 21,588 contracts and subcontracts totaling \$3.2 billion over the July 1, 2014 through June 30, 2018 study period. Figure 3-2 presents the number and dollar value of State contracts and subcontracts included in the disparity study.

Figure 3-2.
Number and dollars of State contracts and subcontracts,
July 1, 2014–June 30, 2018

	Number of procurements*	Dollars (millions)
Construction	2,688	\$ 767
Construction-related professional services	2,548	647
Brokerage and investment	76	2
Other professional services	4,611	1,000
Goods	7,204	465
Other services	4,461	303
Total	21,588	\$ 3,184

Note: *Number of procurements includes subcontracts.
Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data.

Construction contract dollars. Figure 3-3 presents information about contract dollars for 15 categories of work on State construction contracts, as well as other non-classified construction and subcontracts for non-construction work and construction-related contracts (“other non-construction in Figure 3-3).

Dollars for prime contractors are based on the self-performed portion of the contract (i.e., not subcontracted out) so as to not double-count subcontract dollars on each contract.

As shown below, highway, street and bridge construction; office and public building construction; and school building construction accounted for the most of the State’s construction expenditures.

Figure 3-3.
State construction contract dollars by type of work, July 1, 2014–June 30, 2018

Type of work	Dollars (millions)	Percent
Highway, street and bridge construction	\$ 293	38.2 %
Office and public building construction	138	18.0
School building construction	53	6.9
Electrical work	45	5.9
Excavation, site prep, grading and drainage	22	2.9
Asphalt, concrete or other paving	21	2.8
Plumbing, heating and air conditioning	14	1.8
Roofing	11	1.4
Temporary traffic control	10	1.3
Underground utilities (water, sewer and utilities lines)	8	1.0
Drilling and foundations	7	1.0
Installation of guardrails, fencing or signs	6	0.8
Concrete work	6	0.7
Landscape contracting	2	0.3
Trucking and hauling	1	0.2
Other construction	113	14.7
Other non-construction	16	2.1
Total	\$ 767	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data and subcontract data obtained from the State, prime contractors and subcontractors.

Construction-related professional services contract dollars. Figure 3-4 examines contract dollars for State A&E contracts and other construction-related professional services. Architecture and engineering represented most State spending for construction-related professional services.

Figure 3-4.
State construction-related professional services contract dollars by type of work,
July 1, 2014–June 30, 2018

Type of work	Dollars (millions)	Percent
Architecture and engineering	\$ 543	83.9 %
Surveying and mapping	33	5.1
Construction management	27	4.2
Real estate consulting and appraisal services	13	1.9
Transportation planning	12	1.8
Environmental consulting	8	1.3
Other construction-related professional services	1	0.2
Other non-construction-related professional services	10	1.5
Total	\$ 647	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data and subcontract data obtained from the State, prime consultants and subconsultants.

Brokerage and investment contract dollars. Figure 3-5 presents information about contract dollars for four categories of brokerage and investment procurement contracts: municipal financial advisors, bond underwriters and related services, bond counsel and bank fees. Keen Independent obtained information about these contracts through the State procurement systems and from data received from the Colorado Department of Treasury.

Figure 3-5.
State brokerage and investment contract dollars by type of work,
July 1, 2014–June 30, 2018

Type of work	Dollars (millions)	Percent
Municipal financial advisors	\$ 0.9	37.3 %
Bond underwriters	0.7	30.8
Bond counsel	0.4	18.9
Bank fees	0.3	13.0
Total	\$ 2.3	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data and Colorado Department of Treasury cost of issuance data.

Other professional services contract dollars. Figure 3-6 examines contract dollars for the types of work on other professional services contracts (not including construction-related professional services and brokerage and investment services). Information technology and data services (31%) and medical insurance management (27%) represented the most dollars of these contracts.

Figure 3-6.

State other professional services contract dollars by type of work, July 1, 2014–June 30, 2018

Type of work	Dollars (millions)	Percent
IT and data services (including programming and data processing)	\$ 307	30.7 %
Medical insurance management	265	26.5
Advertising, marketing, graphic design and public relations	142	14.2
Human resources and job training	33	3.3
Business research and consulting	9	0.9
Other professional services	<u>243</u>	<u>24.3</u>
Total	\$ 1,000	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data.

Goods contract dollars. Figure 3-7 on the following page presents dollars by type of goods purchased by the State during the study period. (The analysis excluded computers, off-the-shelf software and other goods primarily purchased from a national market.) Road salt and sand; asphalt, concrete and other paving materials; vehicle parts; vehicle purchases and food were the largest areas of goods spending.

Figure 3-7.

State goods contract dollars by type of work, July 1, 2014–June 30, 2018

Type of work	Dollars (millions)	Percent
Road salt	\$ 120	25.8 %
Asphalt, concrete or other paving materials	70	15.0
Vehicle parts	46	10.0
Vehicle purchases	41	8.9
Food	36	7.7
Heavy construction equipment	17	3.8
Petroleum and petroleum products	15	3.2
Animal feed	9	2.0
Furniture	8	1.7
Traffic signaling equipment	8	1.6
Office supplies	7	1.6
Clothing and uniforms	7	1.5
Cleaning and janitorial supplies	7	1.4
Electrical equipment and supplies	6	1.3
Restaurant equipment	5	1.0
Building materials and supplies	4	0.9
Aggregate materials supply	4	0.9
Firefighting equipment and supplies	3	0.7
Farm and garden machinery	3	0.7
Refrigeration and heating equipment	3	0.6
Signs and advertising specialties	2	0.5
Industrial and agricultural gases and chemicals, fertilizer and pesticides	2	0.4
Sewage and water treatment equipment	1	0.2
Other goods	<u>38</u>	<u>8.3</u>
Total	\$ 465	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data.

Other services contract dollars. The State also purchased a wide range of services outside of the professional services examined in previous tables. These purchases are grouped as “other services” in Figure 3-8. Staffing services, local transportation services, aircraft maintenance and repair, and building cleaning and maintenance represented more than one-half of State spending on other services.

Figure 3-8.
State other services contract dollars by type of work, July 1, 2014–June 30, 2018

Type of work	Dollars (\$1,000s)	Percent
Staffing services	\$ 98	32.3 %
Local transportation services	28	9.3
Aircraft maintenance and repair services	27	8.9
Building cleaning and maintenance	22	7.2
Security systems services	14	4.7
Equipment repair services	14	4.5
Digital identity services	9	2.8
Landscape maintenance	7	2.4
Waste collection and disposal	6	2.1
Contracted food services	6	2.0
Elevator services	6	1.9
Delivery services	5	1.7
Printing and copying	4	1.4
Security guard services	2	0.8
Facilities operations and support (includes corrections)	1	0.5
Laundry services	0	0.1
Other services	52	17.3
Other procurements	0	0.1
Total	\$ 303	100.0 %

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

Source: Keen Independent Research from State of Colorado procurement data and subcontract data obtained from the State, prime consultants and subconsultants.

D. Location of Businesses Performing State Work

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

- For each vendor (including subcontractors), Keen Independent determined whether the company had a business establishment in Colorado based upon State vendor records and additional research.
- Keen Independent then added the dollars for firms with Colorado locations and compared the total with that for all companies.

Results indicate that 83 percent of combined State contract dollars went to firms with locations in Colorado. As shown in Figure 3-9, the share of purchases going to companies with Colorado locations was highest for construction (91%) and lowest for other services (77%). Results for goods purchases exclude procurements primarily made from a national market.

It is likely that there are some firms coded as “out of state” which actually have locations in Colorado that the study team did not identify. Therefore, the percentages in Figure 3-9 somewhat understate the actual share of dollars going to businesses in the state.

Figure 3-9.
Dollars of State contracts and subcontracts for firms with locations in Colorado, in millions, July 1, 2014–June 30, 2018

	Colorado	Total	Colorado as percentage of total
Construction	\$ 695	\$ 767	90.6 %
Construction-related professional services	561	647	86.7
Brokerage and investment	2	2	80.5
Other professional services	756	1,000	75.6
Goods	385	465	82.9
Other services	234	303	77.2
Total	\$ 2,633	\$ 3,184	82.7 %

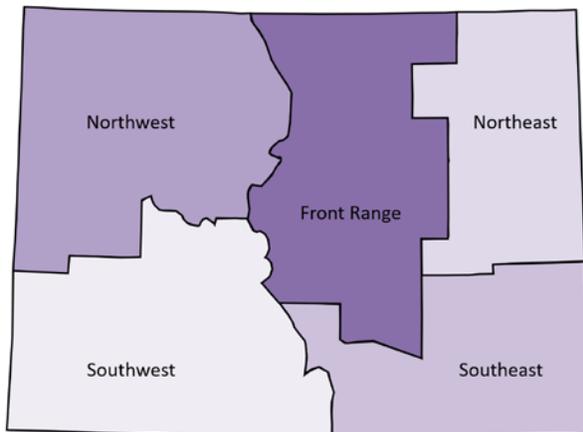
Note: Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data.

Regions. Keen Independent’s availability analysis examines the regions in which a firm can serve customers. Figure 3-10 shows the four quadrants of the state, plus the “Front Range” region, that are used in this analysis. The Front Range extends from Larimer and Weld counties south to Pueblo County. Each region was defined along county boundaries.

For location-specific contracts, the study team coded the region in which that work was performed (e.g., a construction contract in Northeast Colorado). Chapter 5 further explains how location of the work is used in the availability analysis.

Figure 3-10.
Colorado study regions



CHAPTER 4.

Marketplace Conditions

Keen Independent analyzed conditions for HUBs in the industries studied in this report: construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment (collectively, the “Colorado study industries”). The study team conducted original research and reviewed other studies of marketplace conditions in Colorado.

Keen Independent analyzed qualitative information from about 700 individuals representing businesses, government agencies, trade associations and other groups throughout the state.

- The study team conducted in-depth interviews and focus groups involving 115 businesses, trade organizations and public agencies. About 585 businesses provided comments through telephone and online surveys.
- The study team held External Stakeholder Group and Internal Stakeholder Group virtual meetings to ask for input.
- Keen Independent maintained a website, email address and dedicated telephone hotline for any interested individuals to provide comments.

Appendix J examines qualitative information from these sources. Appendices E through I present detailed quantitative information concerning conditions in the Colorado marketplace based on data from the U.S. Census Bureau, survey information and other sources.

Keen Independent’s results concerning conditions in the Colorado marketplace should be viewed in the context of national studies and Congressional findings of discrimination affecting industries relevant to State of Colorado procurement. For example, federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”¹

Chapter 4 begins with historical background on conditions affecting minorities, women, persons with disabilities and members of the LGBT communities in Colorado. Parts B through F of this chapter summarize current information by topic:

- A. Historical context in Colorado;
- B. Entry and advancement;
- C. Business ownership;
- D. Access to capital, bonding and insurance;
- E. Success of businesses; and
- F. Summary.

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

A. Historical Context in Colorado

Like other parts of the country, Colorado has a long history of discrimination against African Americans, Hispanic Americans, Asian Americans, Native Americans, women, members of the LGBT community and persons with physical or mental disabilities. This section is not intended to provide a comprehensive historical narrative for all groups or the subsequent efforts to right these wrongs. Rather, Keen Independent provides examples of past discrimination as context for in-depth analysis of current conditions.

Current characteristics of Colorado's population. About 29 percent of workers in Colorado are people of color (19 percent Hispanic Americans). Based on Census data, about 18 percent of business owners are people of color. Women are 46 percent of workers in the state and a smaller portion of business owners. Persons with mental or physical disabilities are 6 percent of the Colorado workforce and 7 percent of business owners.

Very little data are available for members of the LGBT community. One of the few basic sources of demographic information is Gallup survey data for 2015 through 2017, which indicate that 5 percent of Colorado adults identify lesbian, gay, bisexual or transgender. Among these survey respondents, 57 percent were women and 36 percent were people of color.²

Examples of historical racial discrimination in Colorado. The following provides just a few examples of racial discrimination in Colorado.

African Americans. Disenfranchisement of African Americans was present in the first attempts to form a state constitution that would allow entry of the territory into the United States.³ After statehood, Jim Crow laws restricted African American participation in democratic processes in Colorado.⁴

By the 1920s, the Ku Klux Klan had captured seats of power in Colorado state government.⁵ African Americans faced state-sanctioned violence and destruction of their homes.

Segregation was common in trade, education and religious and social institutions. Interracial marriage was outlawed until 1957 and African Americans experienced violence and threats of violence for interacting socially with non-Hispanic whites.⁶

² LGBT Demographic Data Interactive. (2019, January). Los Angeles, CA: The Williams Institute, UCLA School of Law. Retrieved from <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=8#about-the-data>

³ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

⁴ Romero, T. I. (2005). Wringing rights out of the mountains: Colorado's centennial constitution and the ambivalent promise of human rights and social equality. *Alb. L. Rev.*, 69(2), 569-579.

⁵ Goldberg, R. A. (1981). *Hooded empire: The Ku Klux Klan in Colorado*. Urbana, IL: University of Illinois Press.

⁶ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

Overt housing discrimination through the 1950s kept people of color and religious minorities in the least desirable areas of Colorado cities, which then became more covert through practices such as redlining.⁷

Colorado voters approved a 1974 ballot initiative (later ruled unconstitutional) that would prohibit busing for the purpose of achieving racial balance.⁸ In 1998 the Denver Post reported that African Americans frequently faced workplace threats of violence, with eight African Americans reporting that nooses were hung in their workplaces between August 1997 and June 1998.⁹

Asian Americans. Non-Hispanic whites in the 19th and 20th Centuries were struck with fear of the “Yellow Peril” — a non-existent but perceived threat that Asian immigrants providing cheap labor would make white labor obsolete. As a result, the United States government passed restrictive immigration policies overtly and covertly targeting Asians and Asian Americans; many of these restrictions were not relaxed until the mid-20th Century.¹⁰ However, many of these restrictive laws made exceptions for low-skill workers.¹¹

In the late-19th Century, Colorado politicians and businessmen attracted Chinese immigrants with the promise of a life of wealth and opportunity. However, opportunities for Chinese immigrants were primarily low wage positions in mining and railroad construction. While state officials and businesses were aware of anti-Chinese sentiment among the population, they made little effort to prevent violence against Asian immigrants.¹²

Chinese immigrants and Chinese Americans were often used as scapegoats for economic insecurity during times of financial strain or crisis. Chinese Americans were forcibly removed from many mining towns, often with the active or passive support of local law enforcement. In the Denver Race Riots in 1880, non-Hispanic whites lynched one Chinese resident and burned down much of Denver’s Chinatown.¹³

Japanese Americans also faced discrimination. During World War II, Japanese Americans were forcibly displaced to concentration camps. The Granada concentration camp in Colorado is estimated to have held more than 10,000 Japanese Americans from Colorado and other states.¹⁴

⁷ Ibid.

⁸ Romero, T. I. (2005). Wringing rights out of the mountains: Colorado's centennial constitution and the ambivalent promise of human rights and social equality. *Alb. L. Rev.*, 69(2), 569-579.

⁹ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

¹⁰ Gulasekaram, P., & Ramakrishnan, S. K. (2015). *The new immigration federalism*. Cambridge, England: Cambridge University Press.

¹¹ Peffer, G. A. (1986). Forbidden families: Emigration experiences of Chinese women under the Page Law, 1875–1882. *Journal of American Ethnic History*, 6(1), 28-46.

¹² Wei, W. (2016). *Asians in Colorado: A history of persecution and perseverance in the Centennial State*. Seattle, WA: University of Washington Press.

¹³ Ibid.

¹⁴ Yoo, D. (1996). Captivating memories: Museology, concentration camps, and Japanese American history. *American Quarterly*, 48(4), 680-699.

After the war ended, the fear of Japanese Americans remained. In the 1940s, the governor and legislature of Colorado attempted to follow a national trend of establishing laws precluding immigrants who were ineligible for naturalization — particularly Japanese Americans and Japanese immigrants — from owning property. The State constitution’s provision recognizing property rights of alien residents did not stop the governor and legislature from considering such laws.^{15, 16}

Hispanic Americans. Many Mexican Americans in Colorado owned land as part of the treaty ending the Mexican American War in 1848 and establishing Colorado as a territory of the United States. Mexican American families lost 80 percent of this land due to exorbitant property taxes specifically targeting Mexican Americans, as well as threats of violence.¹⁷

In the early 20th Century following the Mexican Civil War, many people fled Mexico for the United States. Refugees who came to Colorado were relegated to manual labor with “inhuman” working and housing conditions.¹⁸

In the past, many cities and towns in Colorado enforced strict segregation. In communities such as Fort Collins, even trade was impossible for Mexican Americans. Some “integrated” Colorado schools were designed to keep the children of Mexican laborers separate from white children. The curriculum was designed to prepare Mexican American children for manual labor, as young boys were taught to use agricultural tools and young girls were taught sewing and other household services. Most Mexican American children had to leave school before the eighth grade to obtain work that would help support their families.¹⁹

In times of financial crisis when Hispanic American labor was perceived as a threat to white labor, Hispanic Americans were often deported. In the Great Depression, 40 percent of Hispanic Americans in the United States were forcibly displaced, including those who had become naturalized U.S. citizens.²⁰ In 1936, the Governor of Colorado ordered that Hispanic American agricultural workers be deported, and one Colorado newspaper suggested concentration camps for those who refused to be displaced.²¹

Colorado, as with the rest of the nation, faced a labor shortage when the economy improved during and after World War II and non-Hispanic whites were less willing to perform manual labor. In response, the national government created the Bracero Program, which permitted entry of Mexican

¹⁵ Hosokawa, B. (2005). *Colorado's Japanese Americans: From 1886 to the present*. Louisville, CO: University Press of Colorado.

¹⁶ Lubinski, J. (2003). The enemy within? Colorado and the Japanese before, during, and after the Internment. *Rutgers Race & L. Rev.*, 5(2), 239.

¹⁷ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

¹⁸ Donato, R. (2003). Sugar beets, segregation, and schools: Mexican Americans in a northern Colorado community, 1920-1960. *Journal of Latinos and Education*, 2(2), 69-88.

¹⁹ Ibid.

²⁰ Taylor, D. E. (1997). American environmentalism: The role of race, class and gender in shaping activism 1820-1995. *Race, Gender & Class*, 5(1), 16-62.

²¹ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

laborers into the United States for manual work. Between 1942 and 1947, Colorado had contracted with 7,643 Braceros.²² Braceros were often deported when they were no longer needed.²³

Native Americans. Colorado's earliest history is marred by frequent disputes with Native Americans over territory and access to resources.²⁴ Violent campaigns to displace tribes in Colorado left less than 1 percent of original Native American populations in the territory.²⁵

In the Sand Creek Massacre — considered an act of genocide today — a U.S. Army colonel led the Third Colorado Cavalry to massacre unsuspecting Cheyenne and Arapaho people who believed they were under the protection of the federal government.²⁶ Hundreds of Native Americans, including women and children, were killed and their bodies mutilated in the attack.

Mistreatment of Native Americans had popular support among Colorado voters; for example, Colorado's Governor elected in 1878 campaigned on the slogan "the Utes must go."²⁷ Despite a federal commission denouncing the Sand Creek Massacre in 1865,²⁸ social and religious leaders in Colorado at the time celebrated the massacre with some claiming it necessary to maintain "Anglo-Saxon justice."²⁹

Towns, roads and public buildings in Colorado have been named in honor of the military leaders who led the Sand Creek Massacre and other massacres, some of which remain in the 21st Century.^{30, 31, 32}

Examples of historic discrimination against women, members of the LGBT community and persons with disabilities in Colorado. The following provides just a few examples of discrimination against women, members of the LGBT community and persons with mental or physical disabilities in Colorado's history.

²² Mize R. L., Jr. (2006). Mexican contract workers and the US capitalist agricultural labor process: The formative era, 1942–1964. *Rural Sociology*, 71(1), 85-108.

²³ Taylor, D. E. (1997). American environmentalism: The role of race, class and gender in shaping activism 1820-1995. *Race, Gender & Class*, 5(1), 16-62.

²⁴ Abbott, C., Leonard, S. J., & Noel, T. J. (2013). *Colorado: A history of the centennial state*. Louisville, CO: University Press of Colorado.

²⁵ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

²⁶ Bartrop, P. R. (2007). Episodes from the genocide of the Native Americans: A review essay. *Genocide Studies and Prevention*, 2(2), 183-190.

²⁷ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

²⁸ Trefousse, H. L. (1964). The joint committee on the conduct of the war: A reassessment. *Civil War History*, 10(1), 5-19.

²⁹ Roberts, G. L. (2016). *Massacre at Sand Creek: How Methodists were involved in an American tragedy*. Nashville, TN: Abingdon Press.

³⁰ Ibid.

³¹ Abbott, C., Leonard, S. J., & Noel, T. J. (2013). *Colorado: A history of the centennial state*. Louisville, CO: University Press of Colorado.

³² Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

Women. Studies have found that women in frontier Colorado were valued partners in agrarian- and family-based economies and were less beholden to Victorian gender norms than in other areas in the United States.^{33, 34} However, the onset of industrialization reshaped the opportunity structure in Colorado and limited opportunities for women to work outside the home.³⁵

The original state constitution of 1876 did not allow women the right to vote. The constitution had granted the state legislature the power to expand suffrage to women; however, women did not win suffrage until a popular referendum 23 years later.³⁶

Women had to wait and fight much longer before other rights were codified, such as when in 1972 Coloradans added the “equality of the sexes” amendment to the State constitution.³⁷ Until 1988, marital rape in Colorado was not a crime.³⁸

Persons with disabilities. In the 19th and 20th Centuries, political and cultural leaders in Colorado often referred to racial minorities as suffering from a form of mental debilitation, highlighting Colorado’s cultural perspective of both racial minorities and persons with mental disabilities as subhuman.³⁹

In the early 20th Century, the Ku Klux Klan-controlled state legislature proposed measures to sterilize persons with inheritable disabilities. While these measures were never enacted, their proposal speaks to how persons with mental disabilities were perceived as either a burden or a menace to society.⁴⁰

Nationally, about 65 percent of persons with mental or physical disabilities are unemployed and two thirds of unemployed persons with disabilities would prefer to be employed, which suggests a barrier to employment. A 2009 study of Colorado business owners concludes that negative perception of persons with disabilities largely contributes to employment barriers.⁴¹ The study reported that many business owners have negative perceptions of persons with disabilities, and that these business owners are less likely to make workplace accommodations for persons with disabilities or see such persons as their equal.

³³ Harris, K. (1984). Sex roles and work patterns among homesteading families in northeastern Colorado, 1873–1920. *Frontiers: A Journal of Women Studies*, 7(3), 43-49.

³⁴ Herr, E. (1995). Women, marital status, and work opportunities in 1880 Colorado. *The Journal of Economic History*, 55, 339-366.

³⁵ Amott, T. L., & Matthaci, J. A. (1996). *Race, gender, and work: A multi-cultural economic history of women in the United States*. Boston, MA: South End Press.

³⁶ Abbott, C., Leonard, S. J., & Noel, T. J. (2013). *Colorado: A history of the centennial state*. Louisville, CO: University Press of Colorado.

³⁷ Ibid.

³⁸ Hasday, J. E. (2009). Protecting them from themselves: The persistence of mutual benefits arguments for sex and race inequality. *N.Y.U. L. Rev.*, 84, 1464.

³⁹ Delgado, R., & Stefancic, J. (1999). Home-grown racism: Colorado's historic embrace—and denial—of equal opportunity in higher education. *U. Colo. L. Rev.*, 70, 703.

⁴⁰ Goldberg, R. A. (1981). *Hooded empire: The Ku Klux Klan in Colorado*. Urbana, IL: University of Illinois Press.

⁴¹ Copeland, J., Chan, F., Bezyak, J., & Fraser, R. T. (2010). Assessing cognitive and affective reactions of employers toward people with disabilities in the workplace. *Journal of Occupational Rehabilitation*, 20(4), 427-434.

LGBT community. In 1992 the voting public in Colorado passed a referendum to amend the state constitution making certain state and local government protections of the LGBT community illegal. The State argued in the Supreme Court that homosexuality was immoral and that “public morality” constituted a state interest more compelling than personal, familial and religious privacy.⁴² The Supreme Court ruled that the amendment was unconstitutional.^{43, 44}

The LGBT community has faced disproportionate rates of hate crimes motivated by bias against sexual orientation and gender identity. Additionally, past research has shown that members of the LGBT community have been less likely to report hate crimes than other disadvantaged groups, suggesting that estimated rates of hate crimes in Colorado may be too conservative.⁴⁵

Members of the LGBT community also face barriers to participation in the Colorado economy. One study reported that between 33 and 49 percent of LGBT community members in Colorado have faced employment discrimination at some point in their lives.⁴⁶

Another example of potential discrimination is Masterpiece Cakeshop’s refusal to serve members of the LGBT community. Masterpiece Cakeshop, a bakery in Lakewood, Colorado, is again facing legal action for denying public accommodations to a customer celebrating a gender transition.⁴⁷

Summary effects of historic discrimination in Colorado. Past societal discrimination has shaped the composition of the Colorado population, hindered inter-generational creation of wealth and established long-lasting stereotypes for certain “outside” groups.

Although no longer codified in state and local laws, instances of discrimination against people of color, women, members of the LGBT community and persons with disabilities in Colorado continue today based on research conducted in Colorado in recent years. For example, the precursor to the Denver agency for Human Rights & Community Partnerships found that disadvantaged groups suffered from discrimination well into the 20th Century, particularly in access to employment opportunities, housing and health services.⁴⁸ Qualitative results from past disparity studies indicate that disadvantaged groups continue to face unfair treatment in the workplace motivated by bias and stereotypes. This broad assessment provides context for Keen Independent’s analysis of conditions within the Colorado study industries.

⁴² Nussbaum, M. C. (1994). Platonic love and Colorado law: The relevance of ancient Greek norms to modern sexual controversies. *Virginia Law Review*, 80: 1515-1651.

⁴³ Romero, T. I. (2005). Wringing rights out of the mountains: Colorado's centennial constitution and the ambivalent promise of human rights and social equality. *Alb. L. Rev.*, 69(2), 569-579.

⁴⁴ David, P. T. (1994). The Reincarnation of “Jim Crow”: A Thirteenth Amendment analysis of Colorado’s Amendment 2. *4 Temp. Pol. & Civ. Rts. L. Rev.*, 133, 142.

⁴⁵ Langenderfer-Magruder, L., Whitfield, D. L., Walls, N. E., Kattari, S. K., & Ramos, D. (2016). Experiences of intimate partner violence and subsequent police reporting among lesbian, gay, bisexual, transgender, and queer adults in Colorado: Comparing rates of cisgender and transgender victimization. *Journal of Interpersonal Violence*, 31(5), 855-871.

⁴⁶ Whitfield, D. L., Walls, N. E., Langenderfer-Magruder, L., & Clark, B. (2014). Queer is the new black? Not so much: Racial disparities in anti-LGBTQ discrimination. *Journal of Gay & Lesbian Social Services*, 26(4), 426-440.

⁴⁷ Sager, L. G., & Tebbe, N. (2019). The reality principle. *Const. Comment.*, 34, 171.

⁴⁸ Denver Commission on Community Relations, WH903, Western History Collection, The Denver Public Library.

B. Entry and Advancement

Research throughout the United States has detailed the negative effects of discrimination on the employment and advancement of people of color, women, persons with disabilities and members of the LGBT community. The study team examined whether these barriers to employment appeared in the Colorado study industries. Appendix E presents detailed results.

As summarized below, quantitative analyses of the Colorado marketplace — based primarily on data from the 2014–2018 American Community Survey (ACS) — showed that, in general, women and some racial minority groups are underrepresented among employees in the study industries. In addition, people of color and women appeared to face barriers regarding advancement to managerial positions within the study industries.

Because individuals who form businesses tend to work in relevant industries before starting their own businesses, any barriers related to entry or advancement may prevent some minorities, women and persons with disabilities from starting businesses in those industries. (Note that there was no information about members of the LGBT community in the ACS data.)

Quantitative information concerning entry into study industries in Colorado.

Keen Independent’s analyses suggest that people of color, women and persons with disabilities encounter barriers to entry for certain study industries in Colorado. (There were no data on employment outcomes for LGBT individuals.) The following summarizes where there were statistically significant differences in employment outcomes for a group for a particular industry.

- Fewer African Americans, Asian Americans and women worked in the Colorado construction industry than what might be expected based on their representation in other industries in the state.
- Fewer African Americans, Asian Americans and women worked in the Colorado construction-related professional services industry than what might be expected based on representation among all workers in Colorado who were 25 and older with a four-year college degree. Similarly, fewer African Americans and women worked in other professional services than what might be expected based on analyses of other workers with a four-year college degree.
- Among Colorado civil engineers, there were also fewer people of color (except for Hispanic Americans), women and persons with disabilities than what might be expected based on their representation among all people 25 and older who have a four-year college degree.
- In both the goods industry and the other services industry, there were fewer Asian American and female workers than expected based on the overall workforce.
- Hispanic Americans and persons with disabilities represented a smaller portion of workers in the Colorado brokerage and investment industry than would be expected based on their representation in all other industries.

Quantitative information concerning advancement in the Colorado construction industry.

The ACS data provided detailed information about employees in individual construction trades. Keen Independent’s analyses indicate statistically significant outcomes regarding advancement based on ACS data for the industry:

- Representation of people of color was much lower in certain construction trades than others.
- Most construction trades have very few female workers.
- Compared to non-Hispanic whites working in the construction industry, people of color were less likely to be managers.
- Women working in the construction industry were less likely than men to be managers.

Qualitative information about entry and advancement. Keen Independent collected qualitative information about entry and advancement in the Colorado study industries through surveys, interviews, focus groups and stakeholder meetings.

Some minority, female and white male interviewees described workplace conditions in Colorado that are unfavorable to women and people of color. For example, one owner of a minority-owned professional services firm commented that there was “no way” to be promoted in her industry. Several interviewees talked about double standards for women and persons of color that limited opportunities.

Past studies of the Colorado marketplace indicated similar results. Some firms in the area have reported that race- and gender-motivated discrimination has created barriers to opportunities.^{49, 50} Many firms commented on the enduring prevalence of derogatory and derisive treatment of racial and gender minorities in professional settings.⁵¹ Some nonminority interviewees reported that their firms are more successful in winning work when the face of the company is a white man.⁵²

Effects of entry and advancement on the Colorado study industries. If there are barriers for people of color, women, persons with disabilities and members of the LGBT community entering and advancing within the Colorado study industries, there could be substantial effects on the number of businesses owned by members of these groups in the construction, construction-related professional services, other professional services, goods, other services and brokerage and investment industries.

⁴⁹ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website:

<https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

⁵⁰ MGT of America. (2014). *Disparity study for Denver Public Schools* (Rep.). Retrieved from

<https://businessdiversity.dpsk12.org/wp-content/uploads/sites/29/DPS-Disparity-Study-Draft-Report-10.17.2014.pdf>

⁵¹ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.).

Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁵² Ibid.

- Typically, employment and advancement are preconditions to business ownership in study industries. Because certain minority groups, women and persons with disabilities appear to be underrepresented in the Colorado study industries and as managers in the construction industry, it follows that such underrepresentation may reduce the number of people of color, women and persons with disabilities community starting businesses, reducing their overall availability in the marketplace.
- Underrepresentation of certain groups and women in the Colorado study industries — particularly in managerial roles — may perpetuate any beliefs or stereotypical attitudes that HUBs may not be as qualified as majority-owned businesses. Any such beliefs may also make it more difficult for HUBs to win work in Colorado, including work with public agencies.

C. Business Ownership

National research and studies in other states have found that race, ethnicity and gender also affect opportunities for business ownership, even after accounting for race- and gender-neutral factors. Figure 4-1 summarizes how courts have used information from such studies — particularly from regression analyses — when considering the validity of an agency’s implementation of the Federal DBE Program.

Quantitative information about business ownership. The study team used 2014–2018 ACS data to examine whether there were differences in business ownership rates between people of color and whites, women and men, and persons with disabilities and all others in the Colorado study industries. Evidence from these data suggests differences for minorities, women and persons with disabilities in many of the Colorado study industries. (ACS data do not include information on members of the LGBT community.)

Across study industries, each minority group as well as women tended to show lower rates of business ownership than non-Hispanic whites and men.

Keen Independent used regression analyses to examine whether differences in business ownership rates in Colorado persisted after accounting for other personal characteristics. After controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates were evident for:

- Hispanic Americans, Native Americans and women working in the construction industry (substantial disparities);
- Asian Americans, women and persons with disabilities working in the construction-related professional services industry (disparities for Asian Americans and women were substantial);
- Asian Americans working in other professional services (a substantial disparity);
- Hispanic Americans working in the goods industry (a substantial disparity);
- Hispanic Americans working in the other services industry (a substantial disparity); and
- African Americans, Asian Americans, Hispanic Americans and women in the brokerage and investment industry (substantial disparities).

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

Qualitative information about business ownership.

Keen Independent collected qualitative information about business ownership in the Colorado study industries through in-depth interviews, focus groups, surveys and other means.

Many of the comments about having a business related to staying in business during the COVID-19 pandemic. Interviewees in each of the study industries indicated challenges trying to keep their businesses alive. A female business owner indicated that the pandemic “has totally wiped us out!”

Many firm owners reported they have seen contracts canceled or put on hold, supply chain limitations and other unforeseen challenges. A trade association representative declared that small businesses “are either not getting work at all or go broke doing it.”

As examined later in Chapter 4 (and in Appendix H), relatively few minority- and women-owned firms in the Colorado marketplace are large. Some interviews indicated that surviving the pandemic is more difficult for minority- and women-owned firms particularly when small. With many State projects coming to an end along with significant budget cuts during the pandemic, one state agency representative said that women- and minority-owned businesses are at a disadvantage as they “don’t have the same resources, big backlogs, or cash sitting around.”

The results indicating that minorities and women may face additional difficulties related to business ownership are consistent with previous research conducted in the Colorado marketplace. For example, a 2014 study for Denver Public Schools reported that people of color and nonminority women are less likely to be self-employed than white men.⁵³

D. Access to Capital, Bonding and Insurance

Business creation and long-term success rests on access to capital. Discrimination at any link in that chain may produce cascading effects on business formation and success.

Figure 4-1. Use of regression analyses of business ownership in defense of the Federal DBE Program

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

⁵³ MGT of America. (2014). *Disparity study for Denver Public Schools* (Rep.). Retrieved from <https://businessdiversity.dpsk12.org/wp-content/uploads/sites/29/DPS-Disparity-Study-Draft-Report-10.17.2014.pdf>

Evidence suggests that people of color and women face disadvantages in accessing the capital necessary to start, operate and expand businesses. Minorities and women tend to start businesses with less capital (based on national data). As discussed in Appendix G, studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Interviews conducted as part of this study further emphasize this conclusion. For example, a representative of a trade association reported access to capital as the “number one challenge for any business,” emphasizing that African American-owned businesses, often unable to secure financing, are at an even greater disadvantage. One African American female owner of a professional services firm remarked that minorities struggle to get access to capital and that business opportunities “do not exist” without that access.

Keen Independent examined whether minority and female business owners (and potential business owners) have access to capital — both for their homes and for their businesses — that is comparable to that of non-minorities and men. Information for persons with disabilities and members of the LGBT community is more limited.

In addition, the study team examined any barriers in obtaining bonding and insurance.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership and building home equity can affect business opportunities by limiting funds available for new or expanding businesses. There is considerable national research documenting disparities in homeownership and access to home mortgages for minority groups (see Appendix G).

Keen Independent analyzed 2014–2018 ACS data to determine if there were any differences in homeownership in Colorado by racial and ethnic groups. The study team also examined the potential impact of race and ethnicity on mortgage lending in Colorado based on Home Mortgage Disclosure Act (HMDA) data for 2013, 2017 and 2018. Results are described below.

Homeownership rates. In 2014–2018, relatively fewer African Americans, Asian Americans, Hispanic Americans and Native Americans in Colorado owned homes compared with non-Hispanic whites. Among those who owned homes, median home values for African Americans, Hispanic Americans and Native Americans were lower than the home value for non-Hispanic whites. Additionally, fewer persons with disabilities owned homes when compared with all others.

Mortgage lending. In 2013, high-income African Americans, Asian Americans, Hispanic Americans, Native Americans, and Native Hawaiian and other Pacific Islanders applying for home mortgages in Colorado were more likely than high-income non-Hispanic whites to have their applications denied. Disparities were also evident for African Americans and Native Americans in 2017 and for all minority groups in 2018. (Note that “high-income applicants” are those households with 120 percent or more of the area’s median family income, as identified by the U.S. Department of Housing and Urban Development.⁵⁴)

⁵⁴ Median family income for the Denver, CO MSA was about \$78,000 in 2013 and \$84,000 in 2017. Likewise, median family income for the non-metro portion of Colorado was about \$60,000 in 2013 and \$64,000 in 2017. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2013 and 2017 CRA/HMDA reports.

Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending is one example of such types of discrimination through fees associated with various loan types. Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risk of foreclosure.

- There is national evidence that some lenders disproportionately targeted minorities with subprime loans, even when applicants could qualify for prime loans.
- Analysis of Colorado data indicates that a relatively high share of conventional home purchase loans and conventional home refinance loans were subprime for African Americans, Hispanic Americans, Native Americans, and Native Hawaiians and other Pacific Islanders.

In conclusion, there is considerable quantitative evidence of disparities in homeownership and home mortgage lending for people of color in Colorado. The impacts of past housing discrimination are long-term and widely disruptive. Past discrimination affects current home equity, personal capital to start and expand a business, the ability of minority business owners to access business credit and access to bonding for construction business owners.

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

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board's Survey of Small Business Finances (SSBF) — the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The Mountain region is the level of geographic detail of SSBF data most specific to Colorado, and 2003 is the latest information available from the SSBF. (More recent national data, including from 2016 Annual Survey of Entrepreneurs, are consistent with 2003 SSBF results.⁵⁵)

Business loan approval rates. Keen Independent examined business loan approval rates in the Mountain region and at the national level in 2003. Results include the following:

- Loan applications were more likely to be denied among minority and female applicants (13%) compared to nonminority male-owned businesses (10%) in the Mountain region.
- Nationally, African American-owned businesses had loan denial rates considerably higher than the rate for non-Hispanic white males (51% and 8% respectively). After statistically controlling for race- and gender-neutral factors including various firm characteristics, the firm's credit and financial health and business owner characteristics, businesses owned by African Americans in the United States were more likely to have their loans denied than other businesses.

⁵⁵ United States Census Bureau. (2016). *2016 Annual Survey of Entrepreneurs* [Data file]. Retrieved from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

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.

- In the Mountain region, minority- and women-owned businesses that reported needing loans (29%) were more likely than non-Hispanic white-owned firms (16%) to indicate that they did not apply for those loans because of fear of loan denial.
- After statistically controlling for various race- and gender-neutral factors for the firm and firm ownership, African American- and female-owned businesses were more likely to forego applying for a loan due to fear of denial. These results were statistically significant.

Loan values and interest rates. Keen Independent also examined 2003 SSBF data on the average business loan values and interest rates paid by small businesses that received loans.

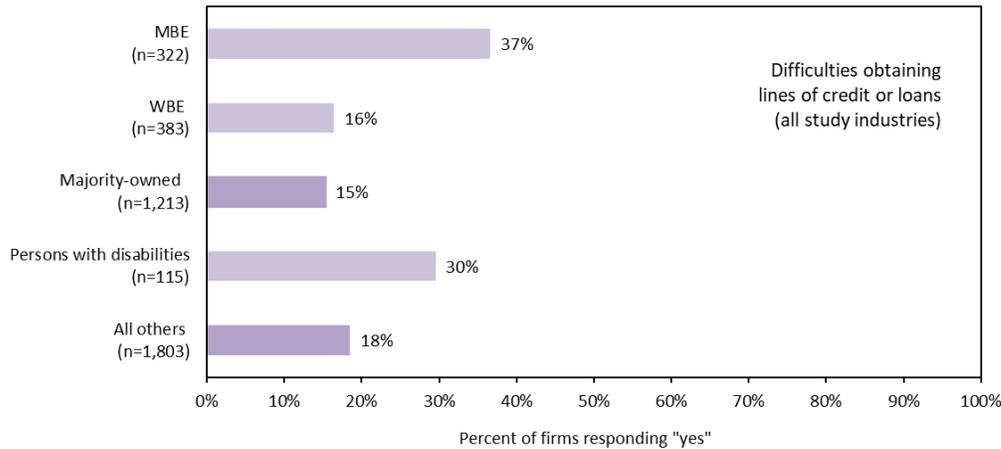
- The mean value of approved loans for minority- and female-owned businesses in the Mountain region (\$98,000) was lower than for non-Hispanic white male-owned firms (\$231,000).
- According to national 2003 SSBF data, minority- and female-owned businesses were issued loans with a higher interest rate on average than majority-owned businesses (7.5% and 6.4%, respectively). After accounting for various race- and gender-neutral business and business owner characteristics, statistically significant disparities persisted among African American- and Hispanic American-owned firms.

Experiences of MBEs, WBEs and majority-owned businesses in the Colorado marketplace. As part of availability surveys the study team conducted in spring 2020, Keen Independent asked several questions related to potential barriers or difficulties in the local 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 business start-up or expansion, or with obtaining work. Think about your experiences in the past six years in Colorado as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties. The first question was,

“Has your company experienced any difficulties in obtaining lines of credit or loans?”

As shown in Figure 4-2, 37 percent of minority-owned firms (MBEs) responded “yes,” which was more than twice as likely as among majority-owned firms. About 30 percent of firms owned by persons with disabilities reported difficulties obtaining lines of credit or loans compared with 18 percent of all other businesses.

Figure 4-2.
Responses to availability survey questions concerning loans and bonding, Colorado



Source: Keen Independent Research from 2020 availability survey.

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

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

“Has your company obtained or tried to obtain a bond for a project?”

[If so] “Has your company had any difficulties obtaining bonds needed for a project?”

Among the one-half of construction firms that had obtained or tried to obtain a bond for a project, 33 percent of MBEs and 14 percent of white women-owned firms (WBEs) indicated difficulties obtaining bonds needed for a project compared with 8 percent of majority-owned firms.

Insurance requirements. The study team also asked,

“Have any insurance requirements on projects presented a barrier to bidding?”

Again, insurance requirements appear to present a barrier to relatively more minority- and women-owned firms than majority-owned firms. Approximately 22 percent of MBEs and 14 percent of WBEs interviewed reported such difficulties compared with 9 percent of majority-owned firms.

Qualitative information about access to capital, bonding and insurance. Keen Independent collected qualitative information about access to capital, bonding and insurance for businesses in the Colorado marketplace through in-depth interviews, focus groups, surveys and other means.

Business financing. Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment) and surviving poor market conditions.

- Small business owners indicated that access to financing was a barrier in general and more specifically when starting and first growing their businesses. Many used personal or family resources to finance their businesses. One Hispanic American business owner reported, “You couldn’t go anywhere if your family didn’t have money.”
- Some business owners reported that obtaining financing continues to be a barrier for their businesses today making it difficult to respond to the ups and downs of the Colorado marketplace.
- Many minority- and women-owned firms reported even greater uncertainty as contract delays and cancelations persist during the COVID-19 pandemic.
- Some interviewees, including HUBs and majority-owned firms, reported slow payment on contracts and subcontracts with some invoices unpaid for 60 to 90 days. One white female business owner reported that waiting up to 90 days for payment is problematic as it is unlikely that she would “be in a place where I don’t need the money.”

Some interviewees reported that it was more difficult for women and minorities to obtain financing.

- An African American owner of a construction firm reported never being granted a loan, adding that without an established credit history “the banks just don’t deal with you.”
- One Hispanic American female business owner stated that without access to financing, she had to “pull from savings and family.” Another women business owner reported funding her businesses with “credit cards and savings.”
- The white female representative of a professional services firm reported that she was denied a line of credit because her business needed to be in operation longer to qualify.

Also, if business size and personal net worth are affected by race or gender discrimination, such discrimination could also impact the ability to obtain business financing. This can have a self-reinforcing effect, as many interviewees noted the importance of business capital and credit to pursue large contracts.

A recent study in the Denver marketplace also reported that some minority- and women-owned firms may face additional barriers to business financing.⁵⁶ Interviewees in this study stressed the importance of access to capital to obtain work and survive sudden economic downturns.

⁵⁶ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Bonding. For State construction contracts, surety bonds are typically required to bid on projects. Sometimes prime contractors require subcontractors on a project to have bonds as well.

To obtain a bond, businesses must provide company history and evidence of financial strength to a bonding company. The bonding company uses this information to determine whether to issue a bond of a particular size. Consequently, any reduced access to capital may negatively impact the ability to obtain a bond. Bonding companies also use different ratios to calculate bonding capacity and they charge different rates to different businesses, which can affect the cost-competitiveness of a firm's bids. According to business owners and other individuals interviewed:

- Many MBEs, WBEs and other small construction companies cannot obtain the necessary bonding to bid on State contracts or certain sizes of contracts. There is evidence that companies lose contracts or are unable to compete for them because of bonding requirements. Bonding requirements may force them to operate as subcontractors on public contracts if primes are willing to “carry” the subcontractors without their own bonding.
- Bonding is linked to company assets, and according to some interviewees, a personal guarantee can be required.
- Some interviewees reported on the “catch-22” of not having the financial stability required to secure bonding. One African American business owner said, “Well you don’t have the bonding, you don’t have the finances, you can’t do this job.”
- Interviewees explained the link between business and personal finances and bonding. In addition to barriers in obtaining a bond, requirements by bonding companies can negatively affect small, disadvantaged businesses. For example, a representative of an industry association reported that bonding companies often hold “retainages” that are a barrier for many small businesses with limited financial resources.

Previous research in the Colorado marketplace found evidence that some bonding requirements prevent small businesses from bidding on public works projects they are qualified to perform.⁵⁷ A firm in the Denver marketplace said that bonding requirements impose caps on small business revenue and others stated that bonding requirements preclude small and minority businesses from participating in bids.⁵⁸ Another Denver-based firm argued that smaller firms are held to the same bonding requirements as large firms, requirements which impose no barriers to large firms but unduly burden small firms.⁵⁹

⁵⁷ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁵⁸ MGT of America. (2014). *Disparity study for Denver Public Schools* (Rep.). Retrieved from <https://businessdiversity.dpsk12.org/wp-content/uploads/sites/29/DPS-Disparity-Study-Draft-Report-10.17.2014.pdf>

⁵⁹ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Access to insurance. Firms bidding or proposing on contracts with the State must meet its insurance requirements. Provisions often apply to subcontractors and subconsultants. One representative of a State agency commented on how these requirements affect subcontracts: “They have ‘flow-down’ clauses and it is a challenge for a lot of small businesses to carry the same level of insurance that’s required of the prime.”

The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to doing business. Some interviewees reported that the cost, especially at high dollar levels or types of insurance such as professional liability insurance, made it difficult to work in the public sector. For example, an African American owner of a professional services firm remarked that high insurance requirements relative to the cost of a project can be a barrier for small firms. Another business owner emphasized, “You got to make enough money to eat and pay for insurance.”

If a small business owner decides that the premiums for a certain level of insurance are cost-prohibitive, it may preclude the firm from bidding on certain contracts, especially for the public sector. In one extreme case, a small business owner reported that he no longer performs engineering services due to the high cost of liability insurance.

These results are largely consistent with the findings of other studies. A study of the Denver area marketplace found that insurance requirements prevented some small firms from submitting bids or proposals.⁶⁰ Past studies have reported that some minority firms believe they are held to different insurance standards and requirements than nonminority firms, arguing that prime contractors use stringent insurance requirements act as a “scapegoat” for rejecting bids from minority firms.⁶¹

Effects of access to capital, bonding and insurance in the Colorado marketplace. Potential barriers associated with access to capital, bonding and insurance may affect business outcomes for HUBs compared to majority-owned firms.

- Well-capitalized businesses are, in general, more successful than other businesses.
- Many business owners reported securing access to bonding and insurance to be a challenge for HUBs. One African American business owner stated that due to bonding requirements, he must look to contracts in the \$10,000 range.
- A company must also have considerable working capital to complete a contract or subcontract for the State.
- Compared with majority-owned firms, HUBs in the Colorado are disproportionately small. Obtaining business financing, bonding and insurance is more of a barrier to small businesses than large businesses. The effect of such barriers is to make it less likely that a small firm can expand or successfully pursue public sector work.

⁶⁰ Ibid.

⁶¹ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

- Any barriers to accessing capital can affect a company’s ability to obtain a bond of a certain size. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms. One African American business owner reported losing a \$1 million job because he could not secure the necessary bonding.
- There is some quantitative evidence that people of color do not have the same personal access to capital as non-Hispanic whites, which affects business financial resources. Personal net worth and financial history can affect access to business loans and bonding in Colorado.

E. Success of Businesses

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of HUBs differs from that of majority-owned businesses in Colorado. The study team examined business success in terms of business closure, expansion, and contraction; participation in the public and private sectors; bid capacity; and business receipts and earnings in study industries. Appendix H provides details about quantitative analyses of success of businesses. Keen Independent also collected and analyzed information from interviews with business owners and managers and others knowledgeable about the Colorado marketplace.

As with other analyses in Chapter 4, there was very little quantitative information on firms owned by members of the LGBT community.

Quantitative analysis of business closure, expansion and contraction. Based on U.S. Small Business Administration analyses for 2002 to 2006 for Colorado, African American-, Asian American- and Hispanic American-owned firms were more likely than white-owned businesses to close. In Colorado from 2002 to 2006, firms owned by African Americans and Asian Americans were less likely to expand and more likely to contract than white-owned firms.

Quantitative analysis of business receipts and earnings. Keen Independent examined business earnings data for Colorado study industries from the U.S. Census Bureau and the 2020 availability surveys with Colorado businesses. The data for annual revenue pertained to 2012 and 2014 through 2018 for the Census data and 2015 through 2019 for Keen Independent’s availability surveys.

- Across time periods and data sources, minority- and women-owned firms tended to have lower annual revenue than majority-owned firms.
- Regression analyses controlling for race- and gender-neutral factors indicated that reported earnings for women-owned business owners in construction, construction-related professional services, other professional services, goods and other services were lower than earnings for male-owned firms.
- The same analyses also indicated that some minority groups tended to report earnings lower than majority business owners in construction-related professional services, other professional services and goods industries.
- Similarly, the regression analyses indicated that business owners with disabilities had earnings lower than other businesses in the construction and other services industries.

Quantitative analysis of telephone survey results concerning potential barriers.

Keen Independent’s availability surveys with Colorado businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business. The availability surveys suggest that relatively more minority- and women-owned firms experienced specific barriers to success.

MBE/WBEs. Answers to questions about marketplace barriers in the availability survey indicated that relatively more MBEs and more WBEs than majority-owned firms face the following barriers:

- Prequalification (among construction-related professional services firms);
- Insurance requirements (among all industries combined);
- Large project sizes (among all industries combined);
- Learning about bid opportunities with State agencies in Colorado (among construction-related professional services, other professional services, goods and other services firms);
- Learning about bid opportunities in the private sector (among firms in all study industries);
- Learning about subcontracting or subconsulting opportunities (among construction and construction-related professional services firms);
- Receiving payment from State agencies (among all industries combined);
- Receiving payment from prime contractors (among construction firms);
- Receiving payment from other customers (among construction, construction-related professional services and goods firms); and
- Obtaining approval from inspectors or prime contractors (among construction-related professional services firms).

There were some differences in answers to marketplace barrier questions that were only identified for MBEs. Relatively more MBEs than majority-owned firms face difficulties related to:

- Prequalification (among construction firms);
- Learning about bid opportunities with State agencies in Colorado (among construction firms);
- Receiving payment from State agencies (among all industries combined);
- Receiving payment from prime contractors (among construction-related professional services firms); and
- Obtaining approval from inspectors or prime contractors (among construction firms).

There was one study industry and one marketplace question where relatively more WBEs reported a barrier compared with majority-owned businesses but MBEs did not. Among other services firms, WBEs were more likely than majority-owned firms to indicate difficulties related to receiving payment from other customers.

Firms owned by persons with disabilities. Based on the availability survey, relatively more firms owned by persons with disabilities experience difficulties related to the following:

- Prequalification (among construction and construction-related professional services firms combined);
- Large project size (among all industries combined);
- Learning about bid opportunities with State agencies in Colorado (among all industries combined);
- Learning about bid opportunities in the private sector (among all industries combined);
- Learning about subcontracting and subconsulting opportunities (among construction and construction-related professional services firms combined);
- Receiving payment from Colorado State agencies (among all industries combined);
- Receiving payment from other customers (among all industries combined); and
- Obtaining approval from inspectors or prime contractors (among construction and construction-related professional service firms combined).

Qualitative information about success of businesses in the Colorado marketplace.

Keen Independent also collected qualitative information about success of businesses in the Colorado marketplace through in-depth personal interviews, focus groups, surveys and other avenues. Some of the comments, especially related to the 2020 pandemic, were noted earlier in Chapter 4.

Fluid employment size and types of work. Interviewees explained that firms in Colorado must continuously adapt their operations in response to market conditions. This flexibility includes the size of a company’s permanent and temporary workforce, owned and leased equipment, the types of work they pursue and where they work within the state.

Flexibility and adaptability during the COVID-19 pandemic are critical to survival. Some business owners reported downsizing or laying off staff to adapt to reductions in workload.

A Denver marketplace study conducted in 2018 reported that adapting to current marketplace conditions may be more difficult for smaller firms.⁶² Some minority-owned firms at that time reported that they were still trying to recover from the economic effects of the Great Recession nearly ten years later.

Importance of business relationships. Relationships within an industry are important to finding opportunities to bid on work. Examples of comments from interviewees include the following:

- Prime contractors take price into consideration when selecting a subcontractor, but their “preferred” relationships also play a large role in the selection process. Trust that a subcontractor will get the job done is important to a prime contractor. “It’s relationship-based” was a typical response to how prime contractors choose subcontractors.
- Business owners reported that it is difficult to cultivate new relationships with prime contractors. “Primes want to work with subs they know” was a typical comment. One owner of a certified business said that primes often give the work to “friends.”
- Some interviewees reported that prime contractors sometimes “shop” a subcontractor’s bid, so even priced-based selection of subcontractors is not always fair.
- Opportunities for a prime contractor or consultant to win work with a customer may also be based on prior relationships. One HUB said that there is an “information silo” for HUBs seeking opportunities with the State and other public agencies. A trade association representative indicated that although there is a lot of work, “it always goes to the same people.”

⁶² BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Many business owners reported evidence of a “good ol’ boy” network at work in Colorado that limited opportunities for HUBs and emerging businesses outside those networks. For example:

- One Asian American business owner stated that the “good ol’ boys’ club” is still “very, very prevalent and they have their favorites that they go to.” A Hispanic American business owner reported that “if you’re not in it, you’re out of it” adding that minorities are often shut out of these networks.
- One business representative reported that business owners who are members of the LGBT community can face “very real” safety issues when dealing with those “clubs.”
- Some business owners and representatives acknowledged existence of a “good ol’ boy” network in Colorado but considered it an expected part of doing business.

These findings are largely consistent with those of previous studies. For example, a 2009 CDOT study reported that previous relationships play a significant role in the subcontractor selection process, and that it can be difficult to cultivate new relationships with both prime contractors and new customers.⁶³ One minority-owned business in that study said that minority-owned businesses would never be considered as subcontractors if not for programs to address past discrimination in procurement.

Evidence of closed networks is reinforced in more recent studies, including a 2018 study for the City and County of Denver. Many minority-owned firms in this study indicated that they never have “a seat at the table” despite being qualified for the work. Minority- and women-owned firms said that they are undermined and not taken seriously due to their minority status and some claimed that construction is a “white man’s world.”⁶⁴

Disadvantages for small businesses. Many interviewees indicated that small businesses are at a disadvantage when competing in the Colorado marketplace.

- For many of the reasons discussed above, minority- and women-owned businesses and other small businesses said that it was difficult to establish relationships with prime contractors. Many commented that primes restrict subs to firms they have worked with in the past and interviewees reported that primes rarely engage minority- and women-owned subcontractors unless there is a contract goal.
- Access to financing can be affected by business size.

⁶³ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation Statewide Transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁶⁴ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Many interviewees said that nearly every step in the state bidding and procurement process (from upfront costs to pre-bid to contract award) poses a challenge for minority- and women-owned businesses and other small businesses.

- It is more difficult for smaller firms to identify contract opportunities with the State. One industry association representative explained, “It’s very hard to find your way into a network that can help you navigate and find opportunities.”
- Small construction businesses seeking prime contracting and subcontracting work face barriers due to public sector bonding requirements.
- One female business owner stated that the RFP process makes it “almost impossible” for a small business to compete.
- Excessive paperwork that often comes with public sector work is an extra burden to small businesses. One business owner reported the paperwork as “onerous” and difficult for small businesses competing with larger, more established firms. Another small business owner reported that not having the personnel to get through all the paperwork is a disadvantage.
- Large size and scope of public sector contracts and subcontracts present a barrier to bidding. A State agency representative explained that many small businesses “don’t have the size that shows they can do a larger project.” A Hispanic American owner of a construction-related firm reported that grouping unrelated services on contracts make it difficult to compete with larger companies for that work.
- Public sector insurance requirements are a barrier to small businesses seeking public sector prime contracts and subcontracts.
- Public agencies favor bidders and proposers they already know, limiting opportunities for other businesses.
- Slow payment or non-payment by owners or by prime contractors can be especially damaging to small businesses. Some interviewees reported that uneven cash flow as a result of late payments is a challenge for small businesses that do not have the financial resources to sustain payroll and pay other expenses.

Data show that MBE and WBE firms in Colorado are somewhat more likely than majority-owned businesses to be small businesses. Therefore, any barriers for small businesses may have a disproportionate effect on MBEs and WBEs.

A past study in Denver reported that small business, in addition to the disadvantages discussed above, have also contended with prompt payment issues when conducting business for the City.⁶⁵

⁶⁵ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Some small business owners indicated in that study that it is especially difficult for small businesses to thrive or even survive when payments are delayed for 60 to 90 days.

Additionally, past Colorado and Denver studies have reported the prevalence of prime contractors' bad-faith efforts to include disadvantaged businesses in subcontracting opportunities. For example, many small businesses recounted prime contractors soliciting their business for quotes hours before bids were due, effectively precluding them from bidding opportunities.^{66,67,68} Small business owners also reported that they and others "suffer in silence" as they fear retaliation for reporting bad faith efforts or discrimination. Some have reported being blacklisted in retaliation for attempting to "blow the whistle" on bad-faith prime contractors.

Evidence of stereotyping and other discrimination. In the in-depth interviews, focus groups, availability surveys and other research the study team conducted, some interviewees indicated difficulties for minorities and women other than those associated with being a small business.

There was some evidence of negative stereotypes concerning minority-owned firms.

- A white male business owner reported that when he sends staff who are women or persons of color to job sites, they are "treated differently" than white males.
- One business owner said that challenges he faces as a black male include racial stereotypes and barriers to capital. He reported, "Racism still happens."
- Another person of color reported that minority business owners "don't have the comfort or forgiveness of any types of other firms."
- A Hispanic American business owner remarked that "as Hispanic or a person of color, you need to work harder than the next person to be able to go through and get the same exact opportunity, and then sometimes it's not even there." Another Hispanic American business owner reported to have "fired clients because of their open bigotry about race." Another experienced racially motivated verbal abuse.

Women business owners also reported sexism, stereotyping and barriers such as not being taken seriously in their industries.

- A representative of a professional services firm reported sexism in Denver, referring to the city as "Men-ver."

⁶⁶ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁶⁷ MGT of America. (2014). *Disparity study for Denver Public Schools* (Rep.). Retrieved from <https://businessdiversity.dpsk12.org/wp-content/uploads/sites/29/DPS-Disparity-Study-Draft-Report-10.17.2014.pdf>

⁶⁸ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

- One female business owner reported that male colleagues expect her to not be equally “tech savvy” as men. Another women business owner commented that women need to “act smarter” on the job site than their male counterparts. Other women reported men being “dismissive” of women or not taking them seriously.
- Some business owners reported that females are “treated differently,” get “cat calls” or are otherwise harassed when on job sites. One man reported that even though he is new to his business community, it has been easier for him to engage in male dominant spaces than for women with longer histories in the field.

Several interviewees spoke of unfair treatment of businesses owned by persons with disabilities and members of the LGBT community.

- A person with disabilities reported, “There have been ‘subtle’ things that have happened.” Another business owner reported that “the system is ugly” for persons with disabilities.
- One business representative commented that the white male “pool” of decision makers hires people they know which typically does not include businesses owned by persons with disabilities or members of the LGBT community.
- A representative of a trade association stated that regarding business ownership, “We are not even measuring LGBTQ data; we can’t address what we can’t measure.”

The evidence of sexism and racial discrimination is consistent with that found in other studies in Colorado. In a 2009 CDOT study, many minority-owned firms recalled facing overt racial discrimination and stereotyping, particularly in the construction industry.⁶⁹ One firm, for example, recounted being told that the owner’s minority status was the only reason they were awarded a subcontract. A woman-owned firm in a Denver study recounted the blatant gender discrimination, gender stereotyping and sexual harassment she faced in professional service environments.⁷⁰

These studies have reported that firms in the marketplace stress the importance of personal relationships but noted that the existence of “good ol’ boy” networks preclude them from being awarded work they are willing and qualified to perform.^{71, 72, 73}

⁶⁹ D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁷⁰ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

⁷¹ Ibid.

⁷² D. Wilson Consulting Group. (2009). *Colorado Department of Transportation statewide transportation disparity study* (Rep.). Retrieved from Colorado Department of Transportation website: https://www.codot.gov/library/studies/2009-disparity-study-and-appendices/CDOT_2009_Disparity_Study.pdf

⁷³ BBC Research & Consulting. (2018). *2018 City and County of Denver disparity study* (Rep.). Retrieved from City and County of Denver website: <https://www.denvergov.org/content/dam/denvergov/Portals/690/DSBO/DS%20FULL%20REPORT%200410.pdf>

Summary concerning success of businesses in the Colorado marketplace. In Colorado, firms owned by people of color, women and persons with disabilities are more likely to be small businesses. Therefore, any disadvantages for small businesses disproportionately affect MBEs, WBEs and companies owned by persons with disabilities.

Negative effects on people of color, women and persons with disabilities who owned businesses appear to go beyond business size. Interviewees indicated that success in the marketplace depends on relationships with prime contractors and customers and some of the minority and female interviewees, as well as persons with disabilities and members of the LGBT community, reported unequal treatment, negative stereotypes and other forms of discrimination in Colorado.

F. Summary

As discussed in this chapter and supporting appendices E through J, there is information suggesting that there is not a level playing field for businesses owned by minorities, women, persons with disabilities and members of the LGBT community in the Colorado marketplace.

This context is important when considering results of the availability analysis for State contracts (Chapter 5) and utilization and disparity analyses for State contracts (Chapters 6 and 7).

CHAPTER 5.

Availability Analysis

Disparity analyses compare the percentage of a public agency’s contract dollars going to different groups of firms with what might be anticipated given the relative availability of those groups for those contracts and subcontracts. Outcomes for MBEs by racial and ethnic group, WBEs, firms owned by persons with disabilities and LGBT-certified businesses are compared with availability benchmarks for each group. (Collectively, Keen Independent refers to those businesses as Historically Underutilized Businesses or “HUBs.”)

Chapter 5 provides the availability benchmarks for the State procurements examined in this disparity study. The availability results are then used in Chapter 6 when comparing utilization and availability of each for State contracts.

Chapter 5 describes the study team’s availability analysis in eight parts:

- A. Overview;
- B. Definitions of MBEs, WBEs, firms owned by persons with disabilities, LGBT-certified firms and majority-owned businesses;
- C. Information collected about potentially available businesses;
- D. Businesses included in the availability database;
- E. Availability calculations on a contract-by-contract basis;
- F. Availability calculations for the brokerage and investment industry;
- G. Overall availability results; and
- H. Strengths of the Keen Independent approach to calculating availability benchmarks.

Appendix D provides supporting information.

A. Overview

Keen Independent performed a very large survey of firms in Colorado to conduct the availability analysis. Keen Independent surveyed firms that had previously expressed interest in state procurements or were identified on other business lists in lines of work relevant to State contracts. There was no “sampling” of firms when preparing the list of firms to be contacted in the availability survey. The study team produced a database of more than 2,000 total firms qualified and interested in State contracts after screening the businesses responding to the survey.

To develop the availability benchmark for State procurements, Keen Independent performed an availability analysis for each prime contract, subcontract and other procurement examined during the study period. The study team used information collected in the availability survey to conduct this contract-by-contract availability analysis. For example, if there were 100 firms available for a specific procurement and 12 were white women-owned firms, WBE availability for that procurement would be 12 percent.

Keen Independent then had to aggregate the availability results for individual procurements. One could not simply add up the results and divide by the number of procurements to determine an “average availability” since some procurements were very large (and more important in the calculation) and some were very small. Instead, Keen Independent calculated a “weighted average” of HUB availability (for each HUB group) where the weight was the relative size of the individual procurement compared with the total procurement dollars examined.

Using this approach to calculating HUB availability for State procurements is more supportable than using a simple “head count” of HUBs (i.e., simply calculating the percentage of all Colorado businesses that are owned by people of color, women, persons with disabilities or members of the LGBT community). The balance of Chapter 5 explains each step in the analysis and the results.

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure 5-1 summarizes characteristics of Keen Independent’s approach to examining availability. The study team added considerable sophistication to the custom census approaches that have been favorably reviewed in court cases most relevant to the State of Colorado (see Appendix B).

It is important to note that the availability analyses based on race and gender ownership were performed separately from the availability analysis for firms owned by persons with disabilities (compared with all other firms). Finally, the study team conducted an availability analysis for LGBT-certified businesses (compared with firms that were not LGBT-certified). In the three analyses, one firm could be counted as minority- or women-owned, as owned by a person with a disability, and as LGBT-certified.

B. Definitions of MBEs, WBEs, Firms Owned by Persons with Disabilities, LGBT-Certified Firms and Majority-Owned Businesses

The following definitions of MBEs, WBEs, firms owned by persons with disabilities, LGBT-certified firms and majority-owned firms are useful background before explaining the steps to the availability analysis.

MBE, WBE and majority-owned firms. The availability benchmarks use the same definitions of minority- and women-owned firms (MBE/WBEs) as other components of the disparity study (see Chapter 1 for a discussion of racial and ethnic groups included in minority-owned firms). A majority-owned firm is a business that is not minority- or women-owned.

Figure 5-1. Summary of the strengths of Keen Independent’s “custom census” approach

Federal courts have reviewed and upheld “custom census” approaches to examining availability, as described in Appendix B.

Compared with some other previous court-reviewed custom census approaches, Keen Independent added several layers of screening to determine which businesses were potentially available for State procurements.

For example, the Keen Independent analysis included discussions with businesses about interest in public sector work in Colorado, whether they had bid on or performed similar work in the past, contract role and geographic locations of their work — items not included in some of the previous court-reviewed custom census approaches.

Keen Independent also analyzed the sizes of contracts and subcontracts that businesses have bid on or performed in the past (referred to as “bid capacity” in this analysis).

All MBE/WBEs, not only certified firms. When availability results are used as a benchmark in the disparity analysis, all minority- and women-owned firms are counted as such whether or not they are certified. For the following reasons, researching whether race- or gender-based discrimination has affected the participation of MBE/WBEs in contracting is properly analyzed based on the race, ethnicity and gender of business ownership and not on certification status.

- Analyzing the availability and utilization of minority- and women-owned firms regardless of certification status allows one to assess whether there are disparities affecting all MBE/WBEs and not just certified companies. Businesses may be discriminated against because of the race or gender of their owners regardless of whether they have successfully applied for certification.
- Moreover, the study team’s analyses of whether MBE/WBEs face disadvantages should include the most successful, highest-revenue MBE/WBEs, which might not be eligible for certification because of their size. A disparity study that focuses only on MBE/WBEs that are, or could be, certified would improperly compare outcomes for “economically disadvantaged” businesses with all other businesses, including both non-Hispanic white male-owned businesses and relatively successful MBE/WBEs. The study team might observe disparities for MBE/WBEs simply because the minority- and women-owned firms receiving the most work were not counted as MBE/WBEs.¹

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 State of Colorado information to answer questions 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, as discussed in Appendix B of this report.

Courts that have reviewed disparity studies have accepted analyses based on the race, ethnicity and gender of business ownership rather than on certification status.

Firms owned by persons with disabilities. Keen Independent also performed availability analysis for businesses owned by persons with disabilities. A person with a physical or mental disability is someone who has an impairment that substantially limits one or more major life activity. This disability might substantially limit his or her ability to engage in competitive business.

Firms owned by members of the LGBT community. Firms owned by LGBT individuals were those that were listed as LGBT-owned in the Colorado LGBTQ Chamber of Commerce directory or certified as such by the National LGBT Chamber of Commerce. Because the primary source of information was the National LGBT Chamber of Commerce certification list, Keen Independent describes firms owned by members of the LGBT community as “LGBT-certified.” Firms that were

¹ An analogous situation concerns analysis of possible wage discrimination. A disparity analysis that would compare wages of minority employees to wages of all employees should include both low- and high-wage minorities in the statistics for minority employees. If the analysis removed high-wage minorities from the analyses, any comparison of wages between minorities and non-minorities would more likely show disparities in wage levels.

identified as LGBT-owned by the Colorado LGBTQ Chamber or reported to the study team that they were LGBT-owned were also included in the results.

C. Information Collected About Potentially Available Businesses

Keen Independent’s availability analysis focused on firms with locations in Colorado that work in fields related to State construction, construction-related professional services, other professional services, goods and other services contracts (including subcontracts).² Below, we describe how the study team compiled the list of firms to be surveyed and the steps to the survey effort.

Listings of firms to be surveyed. From several sources, Keen Independent compiled a master list of firms to be contacted in the availability surveys.

- **Interested firm lists.** Company representatives who had previously identified themselves to the State as interested in learning about future work, such as registering with the State through online portals, such as Colorado Supplier Self-Service Portal (SuSS) or Colorado Vendor Self-Service (ColoradoVSS) (referred to here as “interested firms”).
- **D&B list.** Businesses that Dun & Bradstreet (D&B) identified in certain subindustries related to entity procurement that had locations in Colorado (D&B’s Hoover’s business establishment database).

Overview of availability surveys. The study team conducted online and telephone surveys with business owners and managers to identify businesses that are potentially available for State procurements. Customer Research International (CRI) performed the surveys under Keen Independent’s direction. Surveys began in April 2020 and were completed in June 2020.

Online surveys. Some of businesses on the interested firms list (described above) had email addresses. The State emailed those that did to request that they either complete the online availability survey or participate in the phone survey when contacted. Some of the businesses reached via email completed the online survey.

Telephone surveys. Parallel to the online survey, CRI used the following steps to complete telephone surveys with business establishments:

- CRI contacted firms by telephone.³
- Interviewers indicated that the calls were made on behalf of the State of Colorado for purposes of expanding their lists of companies interested in performing State agency work.

² Brokerage and investment contracts were studied separately.

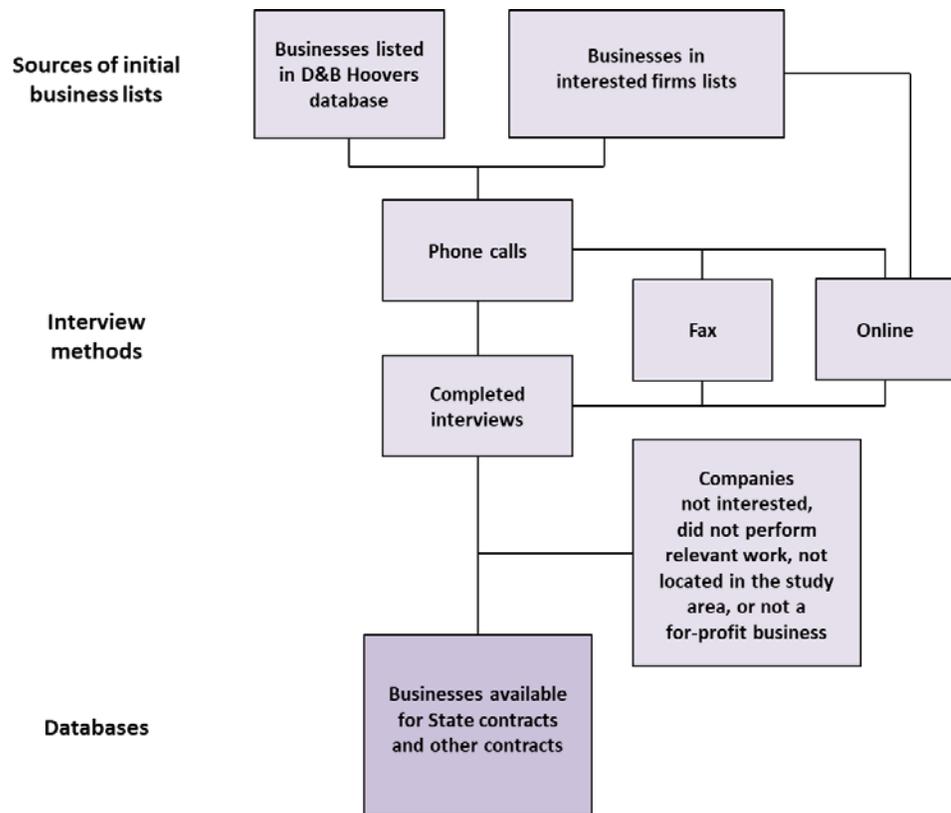
³ The study team offered business representatives the option of completing surveys via fax or email if they preferred not to complete surveys via telephone.

- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in work with the State, so no further survey questions were necessary. (Such surveys were treated as complete at that point.)
- Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.

Other avenues to complete a survey. Even if a company were not directly contacted by the study team, business owners could complete a fillable PDF survey for their company through a link from the disparity study website.

Figure 5-2 summarizes the process for identifying businesses, contacting them and completing the surveys.

Figure 5-2.
Availability
survey process



Information collected. Availability survey questions covered topics 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 work performed or goods supplied;
- Qualifications and interest in performing work or supplying goods for public entities;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor (or prime consultant/subconsultant);
- Ability to work in five different geographic regions (the Front Range and Northeast, Southeast, Southwest and Northwest Colorado);
- Largest prime contract or subcontract bid on or performed in Colorado in the previous six years;
- Year of establishment; and
- Race/ethnicity/gender and disability status of firm owners.⁴

Appendix D explains the survey process, discusses the number of online, phone and other responses, and provides an availability survey instrument.

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 State, among other topics. Keen Independent considered businesses to be potentially available for State 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 sector contracts; and
- c. Reporting past work or qualifications and interest in future work with the State of Colorado, and for some types of work, whether they were interested in prime contracts and/or subcontracts.

⁴ The availability survey did not ask whether businesses were owned by members of the LGBT community. This question was addressed by matching the available firms with certified LGBT business lists.

D. Businesses Included in the Availability Database

Data from the availability surveys allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of State procurements, but it should not be considered an exhaustive list of every business that could potentially participate in those contracts (see Appendix D).

The study team successfully contacted 17,052 businesses in Colorado as part of the availability survey. Many of these firms indicated that they were not interested in working with the State. The study team reviewed responses of those businesses that did indicate qualifications and interest to develop a database of companies potentially available for State work.

Based on this review, Keen Independent identified 2,140 businesses reporting that they were available for specific types of State contracts and subcontracts. Of those businesses:

- 361 (17%) were minority-owned;
- 435 (20%) were white women-owned;
- 126 (5.9%) were owned by persons with disabilities; and
- 2 (0.1%) were LGBT-certified.

The results for minority-owned and white women-owned overlap with firms owned by persons with disabilities (one firm could be both a WBE and owned by a person with a disability, for example).

Figure 5-3 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. Because these results are based on a simple count of firms with no analysis of availability for specific contracts, they only reflect the first step in the availability analysis. Note that 98 percent of the firms in the final availability database appeared to be small businesses based on U.S. Small Business Administration guidelines.

Figure 5-3.
Number of businesses included in the availability database

Note:

Percentages may not add to totals due to rounding.

Does not include firms in the brokerage and investment industry.

Source:

Keen Independent Research
2020 availability survey.

	Number of firms	Percent of all firms
African American-owned	97	4.32 %
Asian American-owned	51	2.27
Hispanic American-owned	187	8.33
Native American-owned	29	1.29
Total MBE	364	16.22 %
WBE (white women-owned)	437	19.47
Total MBE/WBE	801	35.70 %
Majority-owned	1,443	64.30
Total	2,244	100.00 %
Owned by persons with disabilities	126	5.61 %
LGBT-certified	2	0.09
Small business	2,102	93.67

E. Availability Calculations on a Contract-by-Contract Basis

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for each HUB group for use as a benchmark in the disparity analysis.

- Dollar-weighted availability estimates represent the percentage of State procurement dollars that HUBs might be expected to receive based on their availability for specific types and sizes of State construction, construction-related professional services, other professional services, goods and other services prime contracts and subcontracts.
- Keen Independent’s approach to calculating availability is 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 State contract or subcontract (referred to collectively as “procurements”). The study team first examined the characteristics of each specific procurement, 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 procurement was awarded.

Steps to the availability calculations. The study team identified the specific characteristics of each of the 21,588 State procurements included in the analysis and then took the following steps to calculate availability for each procurement (including subcontracts):

1. For each procurement, the study team identified businesses in the availability database that reported in the telephone or online survey that they:
 - Perform that specific type of work (based on one of 70 types of construction, construction-related professional services, other professional services, goods and other services contracts) that accounted for most State procurement dollars);
 - Are qualified and interested in performing work for the public sector in that particular role (prime contractor/subcontractor if a construction contract, prime consultant/subconsultant if construction-related professional services or other professional services contract);
 - Are able to do work in that geographic location; and
 - Had bid on or performed work of that size in Colorado in the past six years (or had done so based on State contract data for the study period); and
 - Were in business in the year that the contract or subcontract was awarded.

2. For the specific procurement, the study team then counted the number of HUBs by group among all businesses in the availability database that met the criteria specified in step 1 above.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 5-4).

The study team repeated those steps for each procurement examined in the disparity study for the State. The study team multiplied the percentage availability for a procurement by the dollars associated with the procurement, added results across all procurements, and divided by the total dollars for all procurements. The result was a dollar-weighted estimate of overall availability of each type of HUB. Figure 5-4 provides an example of how the study team calculated availability for a specific subcontract in the study period.

Special considerations for supply contracts.

Firms that supply equipment, supplies and other goods are typically not “subcontractors” on a contract, even if they are involved in a project that does involve subcontractors (such as a construction contract). When calculating availability for a particular type of goods purchase, Keen Independent counted as available all firms supplying those goods that reported qualifications and interest in that work for the State and indicated that they could provide supplies in the pertinent region of the state. Further, because those firms often bid on a unit price basis without a known specific quantity, bid capacity was not considered in these calculations.

F. Availability Calculations for the Brokerage and Investment Industry

The brokerage and investment procurements examined in this study include issuance of financial instruments as well as banking services. Nearly all of the State’s brokerage and investment procurements relate to firms that are publicly regulated. This includes municipal financial advisors, bond underwriters and banks. Further, the State almost always restricts its choice of firms to those with a physical presence in Colorado. This limits the number of available firms to a very small set of businesses, especially for financial advisors and for bond underwriters.

Figure 5-4.
Example of an availability calculation

One of the subcontracts examined was for electrical work (\$91,765) on a 2016 contract in the Front Range region. 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 2016;
- b. Indicated that they performed electrical work;
- c. Indicated qualifications and interest in such subcontracts;
- d. Reported bidding on work of similar or greater size in the past six years in Colorado (or had done so based on State contract data); and
- e. Reported ability to perform work in the Front Range region.

There were 100 businesses in the availability database that met those criteria. Of those businesses, 29 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 29 percent (i.e., $29/100 = 29\%$).

The weight applied to this contract was $\$91,765 \div \$3.2 \text{ billion} = 0.003\%$ (equal to its share of total procurement dollars). Keen Independent made this calculation for each prime contract and subcontract.

Keen Independent performed similar calculations for firms owned by persons with disabilities and firms that were LGBT-certified.

Instead of performing a survey of available companies, Keen Independent sought comprehensive lists of those companies with locations in Colorado and then determined the ownership of each company. Among all municipal financial advisors, bond underwriters and depository financial institutions in Colorado, there were firms owned by African Americans, Hispanic Americans, Native Americans and white women.⁵ The headcount availability survey results presented in Figure 5-3 do not include these firms. Dollar-weighted results examined in Figure 5-5 incorporates the availability analysis for brokerage and investment firms.

G. Overall Availability Results

Keen Independent used the approach described above to estimate the relative availability of MBE/WBEs, businesses owned by persons with disabilities, LGBT-certified firms and other businesses for State procurements awarded during the study period.

Figure 5-5 presents overall dollar-weighted availability estimates by MBE/WBE group for those procurements.

- MBE/WBE availability for State procurement is about 28 percent. This result is lower than the 37 percent of available firms that are MBE/WBE in Figure 5-3.
- The dollar-weighted availability figure for businesses owned by persons with disabilities was 12 percent (higher than the 6 percent of available firm shown in Figure 5-3).
- The dollar-weighted availability was about 0.02 percent for LGBT-certified businesses. This result is about the same as the results in Figure 5-3.

Figure 5-5.
Dollar-weighted MBE/WBE availability for Colorado procurements, July 2014–June 2018

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

Includes results for brokerage and investment industry.

Source:
Keen Independent Research from 2020 availability survey and analysis of Colorado procurements 2014–2018.

	Total
African American-owned	5.66 %
Asian American-owned	2.13
Hispanic American-owned	5.37
Native American-owned	<u>2.93</u>
Total MBE	16.09 %
WBE (white women-owned)	<u>12.04</u>
Total MBE/WBE	28.13 %
Majority-owned	<u>71.87</u>
Total	100.00 %
Owned by persons with disabilities	12.02 %
LGBT-certified	0.02

⁵ Keen Independent also examined contracts for bond counsel as part of the brokerage and investment procurements. Based on Keen Independent’s research of firms that had submitted proposals to the Colorado Department of Treasury for bond counsel work, none were MBEs, WBEs, owned by persons with disabilities or LGBT-certified. Availability of each of those groups for bond counsel contracts was calculated to be 0 percent.

Not shown in Figure 5-5, the combined dollar-weighted availability of MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified firms is 37.16 percent. It is less than what would be found by simply adding the availability of each group in Figure 5-5 because these groups overlap (for example, some of the firms owned by persons with disabilities are also minority- or women-owned).

Using a contract-by-contract analysis of availability based on the size, type, location and other characteristics of each procurement is a more refined way to calculate availability benchmarks than approaches such as simply counting MBEs, WBEs and total firms (a “headcount” approach). The contract-by-contract, dollar-weighted approach sometimes results in lower MBE/WBE availability benchmarks than a headcount approach due in large part to:

- Keen Independent’s consideration of types, sizes and regions of work performed when measuring availability; and
- Dollar-weighting availability results for each procurement (i.e., a large prime contract has a greater weight in calculating overall availability than a small subcontract).

However, dollar-weighted availability of firms owned by persons with disabilities (12.0%) was higher than indicated based on a simple headcount of those firms (5.9% as shown in Figure 5-3). Availability of LGBT-certified firms was low in both the headcount and the dollar-weighted analyses.

H. Strengths of the Keen Independent Approach to Calculating Availability Benchmarks

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

Accounting for type of work involved in a procurement. The study team took type of work into account by examining 70 different subindustries related to construction, construction-related professional services, brokerage and investment, other professional services, goods and other services procurements as part of estimating availability for State work.

Accounting for qualifications and interest in public sector work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on State procurements, in addition to the consideration of factors such as type, size and location of the procurement. This was based on responses to survey questions, supplemented by review of actual contract performance in the combined entity contract and subcontract data.

- Only businesses that indicated qualifications and interest in bidding as a prime contractor on public agency contracts were counted as available for State prime contracts; and
- Only businesses that reported being qualified for and interested in working as subcontractors on public agency contracts were counted as available for State subcontracts.

Accounting for the size of prime contracts and subcontracts. The study team considered the size — in terms of dollar value — of the procurements that a business bid on or received in the previous six years (i.e., bid capacity) when determining whether to count that business as available for a particular procurement. When determining whether a businesses would be counted as available for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one procurement of an equivalent or greater dollar value in Colorado in the previous six years. Keen Independent asked firms about the sizes of contracts they had performed or bid on in the previous six years (roughly 2014 through 2019) as that time period best matched the years for which State contracts were examined (July 2014 through June 2018).⁶

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

Accounting for the geographic location of the work. Many of the State’s contracts were not location-specific or performed statewide. Other contracts, especially for construction, were location-specific. Therefore, Keen Independent asked firms about where in the state where they were able to work according to five regions:

- The Front Range (from Greeley to Pueblo, including Denver);
- Northeast Colorado (such as Fort Morgan or Burlington);
- Southeast Colorado (such as Trinidad or Lamar);
- Southwest Colorado (such as Durango or Alamosa); and
- Northwest Colorado (such as Grand Junction or Steamboat Springs).

When possible, the study team determined the location of a contract based on where the work was performed. Only firms that reported being available to work in that region were counted as available for that contract (along with other availability screening).

Using 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.

⁶ Keen Independent also reviewed the largest contract or subcontract that a firm performed for the State based on the State data received. If that contract or subcontract exceeded the size of contracts a firm reported performing or bidding on in the availability survey, Keen Independent used the higher figure as the value of its bid capacity in the availability analysis.

CHAPTER 6.

Utilization and Disparity Analysis

Keen Independent examined the percentage of State procurement dollars going to minority- and women-owned firms (MBEs and WBEs) as well as firms owned by persons with disabilities, businesses that are LGBT-certified and all small businesses.

The disparity analysis compares utilization of different groups of firms with the participation that might be expected for State contracts based on the availability analysis. Chapter 3 and Appendix C explain the contracts examined in this study and the methods used to collect and analyze participation of MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses. Chapter 5 and Appendix D explain the availability analysis.

Chapter 6 presents overall results of the utilization and disparity analysis in five parts:

- A. Overview of the utilization analysis;
- B. Utilization of MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses in State contracts;
- C. Disparity analysis for State contracts;
- D. Disparity analysis for State contracts by industry; and
- E. Statistical significance of disparity analysis results.

Chapter 7 provides additional analyses of utilization, availability and disparity results for subsets of contracts, including prime contracts and subcontracts and procurements of different sizes.

A. Overview of the Utilization Analysis

Keen Independent analyzed participation of minority- and women-owned firms in State procurement from July 1, 2014 through June 30, 2018. Keen Independent's utilization analysis included 21,588 procurements totaling \$3.2 billion over this time period.

As discussed in Chapter 3, these contracts do not include those going to government or not-for-profit organizations, regulated utilities or types of purchases primarily made from national markets. As such, the results are limited to contracts that could be performed by businesses located in Colorado.

Keen Independent collected information about the race, ethnicity, gender and disability status of the business owner as well as LGBT certification status for firms receiving State contracts (see Appendix C). Results combine certified and non-certified companies for MBEs, WBEs and firms owned by persons with disabilities.

Calculation of “utilization.” “Utilization” of firms owned by a group is measured as the percentage of procurement dollars awarded firms owned by that group during the study period (see Figure 6-1). For example, Keen Independent calculated MBE utilization by dividing the dollars going to MBEs by the procurement dollars for all firms. WBE utilization refers to participation by white women-owned firms; results for MBEs includes firms owned by men and women of color.

A firm could be owned by a person of color with a disability and/or be LGBT-certified. Therefore, Keen Independent performed three sets of utilization analyses which were based on:

- Race and gender of the business owner;
- Whether the business owner is a person with a disability; and
- Whether the business is LGBT-certified.

Therefore, the utilization results for MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified companies are not additive.

To avoid double-counting contract dollars and to more accurately gauge utilization of different types of firms, Keen Independent based the utilization of prime contractors on the amount of the contract that is self-performed by the prime after deducting subcontract amounts. In other words, a \$1 million contract that involved \$400,000 in subcontracting only counts as \$600,000 to the prime contractor in the utilization analysis. (When subcontract data were not provided for a contract, all of the dollars were attributed to the prime contractor.)

B. Utilization of MBE/WBEs, Firms Owned by Persons with Disabilities, LGBT-Certified Businesses and Small Businesses in State Contracts

Figure 6-2 on the following page presents the utilization of minority- and women-owned firms (top portion of the table) for State contracts during the study period. The bottom portion of the table provides utilization for firms owned by persons with disabilities, LGBT-certified firms and small businesses. Figure 6-2 shows:

- Total number of contracts awarded to the group of businesses (e.g., 853 prime contracts, subcontracts and other contracts to Asian American-owned firms);
- Combined dollars of contracts going to the group (e.g., \$91,334,000 to Asian American-owned firms); and
- The percentage of combined contract dollars for the group (e.g., Asian American-owned firms received about 2.9% of State procurement dollars examined in the study).

Figure 6-1. Defining and measuring “utilization”

“Utilization” refers to the share of procurement dollars the State awarded to a group of businesses during a specific time period. Keen Independent measured the utilization of all minority- and women-owned firms and businesses owned by persons with disabilities regardless of certification. Utilization for LGBT-certified firms is for businesses that have state or national certification.

In addition to a total for MBEs, the study team reports utilization for firms owned by different racial and ethnic groups.

WBE utilization refers to the relative participation of white women-owned firms, so utilization of MBEs, WBEs and majority-owned firms adds to 100%.

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

As shown in the top portion of Figure 6-2, African American-owned firms received \$11 million in contract and subcontract dollars, or about 0.4 percent of total dollars over this time period. About 1.8 percent of State contract dollars went to Hispanic American-owned firms. One tenth of 1 percent of all contract dollars went to Native American-owned firms.

White women-owned businesses obtained \$104 million of contracts and subcontracts, or about 3.3 percent of total dollars. In total, minority- and women-owned firms received 8.4 percent of State contract dollars examined for the study period.

The bottom portion of Figure 6-2 presents the number of procurements and contract dollars going to firms owned by persons with disabilities. Businesses that Keen Independent identified as owned by persons with disabilities received about \$11.7 million (0.37%) of the State contract dollars examined in this study.

Although it is not typical to compare small business utilization with small business availability in a disparity study, Keen Independent did examine utilization of all small businesses in State contracts. From July 2014 through June 2018, \$1 billion in State contract dollars went to small businesses (about 31% of State contract dollars examined in the study).

Figure 6-2.
Utilization of MBE/WBEs, businesses owned by persons with disabilities,
LGBT-certified businesses and small businesses in State of Colorado procurements,
July 2014–June 2018

	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	142	\$ 11,361	0.36 %
Asian American-owned	853	91,334	2.87
Hispanic American-owned	442	55,817	1.75
Native American-owned	44	3,643	0.11
Total MBE	1,481	\$ 162,154	5.09 %
WBE (white women-owned)	1,769	104,335	3.28
Total MBE/WBE	3,250	\$ 266,489	8.37 %
Majority-owned	18,338	2,917,470	91.63
Total	21,588	\$ 3,183,959	100.00 %
Owned by persons with disabilities			
LGBT-certified	5	541	0.02
Small business	12,517	1,001,853	31.47

Note: *Number of prime contracts, subcontracts and other procurements.
Numbers may not add to totals due to rounding.

Source: Keen Independent Research from data on State procurements July 2014–June 2018.

C. Disparity Analysis for State Contracts

Keen Independent’s disparity analysis compares outcomes for each group with benchmarks based on what might occur if each available firm had the same opportunities to obtain contracts or subcontracts after considering the types, sizes and locations of prime contracts and subcontracts they perform. The study team compared the utilization of MBE/WBEs, firms owned by persons with disabilities, and LGBT-certified firms on State contracts with the percentage of contract dollars that those groups might be expected to receive based on the availability analysis described in Chapter 5 (availability is also referred to as the “availability benchmark”). Chapter 5 and Appendix D explain how the study team developed benchmarks from the availability data.

To make results directly comparable, Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts (e.g., 2% utilization compared with 4% availability). Keen Independent then calculated a “disparity index” to easily compare utilization and availability results among groups as well as across different sets of contracts.

- A disparity index of “100” indicates an exact match between actual utilization and what might be expected based on a group’s availability for a specific set of contracts (often referred to as “parity”).
- A disparity index of less than 100 may indicate a disparity between utilization and availability. A disparity index of less than 80 is described as “substantial.”¹

Figure 6-3 describes how Keen Independent calculated disparity indices.

Figure 6-3. Calculation of disparity indices

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

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

For example, if actual utilization of MBEs on a set of State contracts was 2 percent and the availability of MBEs for those contracts was 4 percent, then the disparity index would be 2 percent divided by 4 percent, which would then be multiplied by 100 to equal 50.

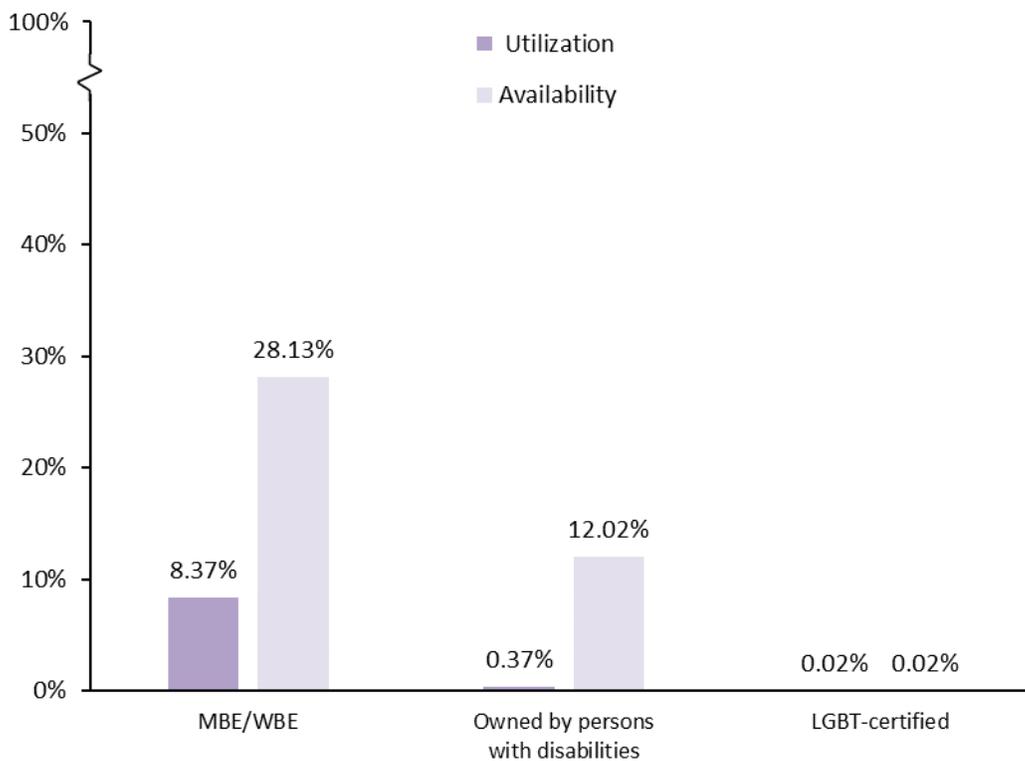
In this example, MBEs received 50 cents of every dollar that they might be expected to receive based on their availability for the contracts.

¹ Some courts deem a disparity index below 80 as being “substantial,” and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013); *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). Also see Appendix B for additional discussion.

Results for minority- and women-owned firms, firms owned by persons with disabilities businesses on State contracts. Figure 6-4 presents the overall results from the disparity analysis.

- The utilization of minority- and women-owned firms in State procurement during the study period — about 8 percent of total contract dollars — was below the 28 percent that might be expected from the availability analysis.
- Utilization of firms owned by persons with disabilities was less than 1 percent of contract dollars. This was also below availability of those businesses for this work (12%).
- A very small percentage of contract dollars went to LGBT-certified firms (0.02%), but because a very small number of firms in the availability analysis were LGBT-certified, that utilization is comparable to the availability benchmark for LGBT-certified companies. (This result would be different if there were data for all firms owned by members of the LGBT community.)

Figure 6-4. Utilization and availability of MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified businesses in State of Colorado procurements, July 2014–June 2018



Source: Keen Independent Research utilization and availability analyses for State contracts.

Figure 6-5 shows utilization, availability and disparity results by group.

African American-owned firms. African American-owned firms received 0.36 percent of contract dollars, substantially less than what might be expected based on the availability analysis (5.66%). The disparity index for this group was 6.

Asian American-owned firms. Asian American-owned businesses received 2.87 percent of contract dollars, more than the availability benchmark (2.13%). The disparity index of 135 exceeded “parity.”

Hispanic American-owned firms. From July 2014 through June 2018, Hispanic American-owned firms obtained 1.75 percent of State procurement dollars, substantially less than what might be expected from the availability analysis (5.37%), resulting in a disparity index of 33.

Native American-owned firms. Utilization of Native American-owned firms was 0.11 percent of contract dollars, substantially less than the availability benchmark (2.93%). The disparity index was 4.

White women-owned firms. The 3.28 percent of State procurement dollars that went to white women-owned firms was less than availability benchmark for this group (12.04%). The disparity index for these businesses was 25.

Firms owned by persons with disabilities. Businesses that Keen Independent identified as owned by persons with disabilities received 0.37 percent of contract dollars compared to the 12.02 percent that would be expected from the availability analysis. The disparity index for the group was 3.

LGBT-certified firms. Utilization and availability were both very low for LGBT-certified companies and would be higher if there were better data on non-certified firms owned by members of the LGBT community. There was no disparity between utilization and availability of LGBT-certified firms. (Note that the disparity the calculation used results going out additional decimal places.)

Figure 6-5.
Disparity analysis for State procurements, July 2014–June 2018

	Utilization	Availability	Disparity index
African American-owned	0.36 %	5.66 %	6
Asian American-owned	2.87	2.13	135
Hispanic American-owned	1.75	5.37	33
Native American-owned	0.11	2.93	4
Total MBE	5.09 %	16.09 %	32
WBE (white women-owned)	3.28	12.04	27
Total MBE/WBE	8.37 %	28.13 %	30
Owned by persons with disabilities	0.37 %	12.02 %	3
LGBT-certified	0.02	0.02	107

Note: Disparity index = 100 x Utilization/Availability.
Results rounded to the nearest one-hundredth of a percent, but disparity indices calculated using utilization and availability results that were not rounded.

Source: Keen Independent Research utilization and availability analyses for State contracts.

D. Disparity Analysis for State Contracts by Industry

Keen Independent examined utilization and availability by industry for the groups of firms with sufficient data to do so. Because of the low utilization and availability of LGBT-certified firms for all contracts combined, several industries showed no utilization and/or no availability of LGBT-certified companies.

Figure 6-6 on pages 8 and 9 of this chapter shows overall utilization and availability of MBE/WBEs and firms owned by persons with disabilities for each of the six study industries examined in this study.

Results for construction, construction-related professional services, goods and other services contracts. In each of these industries, there was a substantial disparity between utilization and availability for firms owned by:

- African Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Utilization of Asian American-owned firms exceeded what might be expected from the availability analysis for construction, construction-related professional services, goods and other services contracts.

Results for other professional services contracts. For other professional services contracts (i.e., professional services other than construction-related professional services), there was a substantial disparity between utilization and availability for firms owned by:

- African Americans;
- Asian Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Brokerage and investment. For State brokerage and investment contracts, there were substantial disparities between utilization and availability of:

- African American-, Hispanic American- and Native American-owned businesses; and
- White women-owned firms.

Keen Independent did not identify disparities for other groups as the study team did not identify any depository financial institutions, municipal financial advisors, bond underwriters or bond counsel in Colorado that were Asian American-owned or owned by persons with disabilities.

Figure 6-6.

Disparity analysis for State procurements by industry, July 2014–June 2018

	Utilization	Availability	Disparity index
Construction			
African American-owned	0.41 %	2.92 %	14
Asian American-owned	0.33	0.09	200+
Hispanic American-owned	3.45	8.72	40
Native American-owned	0.39	2.93	13
Total MBE	4.57 %	14.67 %	31
WBE (white women-owned)	3.82	5.49	70
Total MBE/WBE	8.40 %	20.16 %	42
Owned by persons with disabilities	1.14 %	14.20 %	8
Construction-related professional services			
African American-owned	0.04 %	10.30 %	0
Asian American-owned	6.00	5.18	116
Hispanic American-owned	2.10	3.28	64
Native American-owned	0.00	0.20	0
Total MBE	8.14 %	18.97 %	43
WBE (white women-owned)	2.04	12.40	16
Total MBE/WBE	10.18 %	31.37 %	32
Owned by persons with disabilities	0.03 %	2.38 %	1
Other professional services			
African American-owned	0.56 %	5.06 %	11
Asian American-owned	1.68	3.02	56
Hispanic American-owned	1.02	3.00	34
Native American-owned	0.03	6.49	1
Total MBE	3.29 %	17.57 %	19
WBE (white women-owned)	3.07	9.83	31
Total MBE/WBE	6.35 %	27.40 %	23
Owned by persons with disabilities	0.05 %	21.21 %	0

Figure 6-6 (continued).

Disparity analysis for State procurements by industry, July 2014–June 2018

	Utilization	Availability	Disparity index
Goods			
African American-owned	0.06 %	5.52 %	1
Asian American-owned	0.50	0.24	200+
Hispanic American-owned	0.36	7.71	5
Native American-owned	<u>0.04</u>	<u>0.70</u>	6
Total MBE	0.96 %	14.17 %	7
WBE (white women-owned)	<u>2.62</u>	<u>23.24</u>	11
Total MBE/WBE	3.58 %	37.41 %	10
Owned by persons with disabilities	0.09 %	7.79 %	1
Other services			
African American-owned	0.70 %	4.92 %	14
Asian American-owned	10.22	0.75	200+
Hispanic American-owned	1.28	5.66	23
Native American-owned	<u>0.05</u>	<u>0.40</u>	12
Total MBE	12.26 %	11.73 %	104
WBE (white women-owned)	<u>6.26</u>	<u>17.98</u>	35
Total MBE/WBE	18.51 %	29.71 %	62
Owned by persons with disabilities	0.60 %	3.28 %	18
Brokerage and Investment			
African American-owned	0.00 %	1.10	0
Asian American-owned	0.00	0.00	-
Hispanic American-owned	0.00	1.10	0
Native American-owned	<u>0.00</u>	<u>0.19</u>	0
Total MBE	0.00 %	2.39 %	0
WBE (white women-owned)	<u>1.52</u>	<u>9.33</u>	16
Total MBE/WBE	1.52 %	11.72 %	13
Owned by persons with disabilities	0.00 %	0.00 %	-

Note: Disparity index = 100 x Utilization/Availability.

Results rounded to the nearest one-hundredth of a percent, but disparity indices calculated using utilization and availability results that were not rounded.

Source: Keen Independent Research utilization and availability analyses for State contracts, including subcontracts.

E. Statistical Significance of Disparity Analysis Results

Analysis of statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. As both the availability and the utilization analyses attempted to obtain information for populations of firms and contracts rather than samples, this rationale for an alternative explanation of any disparity is minimized.

Statistical confidence in availability results. Keen Independent did not draw a sample of companies to research in the availability analysis. The study team attempted to reach each firm in the relevant geographic market area identified by participating entities or by Dun & Bradstreet as possibly doing business within relevant subindustries (as described in Appendix D).

Keen Independent examined the accuracy of the initial list of potentially available firms and the number of firms successfully reached from that list in the availability survey effort.

- The study team examined how many of the potentially available firms were successfully contacted in the availability survey. Keen Independent was able to reach more than 17,000 businesses on the list of potentially available companies, a very large number of responses. The “response rate” to the survey was very high: 40 percent of the businesses on the initial list that had valid phone numbers and were in business were successfully contacted.
- Figure 6-7 explains the high level of statistical confidence in the availability results due to the number of responses and the high response rate.
- The second issue is whether there was any indication that availability results would differ if 100 percent of the firms the study team attempted to contact were successfully reached.
 - The very high response rate reduces this possibility.
 - The survey approach also minimizes this possibility. There were multiple callbacks at different times of day and different days of the week over several months to reach companies that didn’t respond to the first contact, and interviewees were given multiple ways to complete a survey (phone, online, fax, email). Interviewers clearly identified that they were calling as part of a State of Colorado study. Efforts to address potential language barriers also minimized the possibility of under-reaching certain groups.

Figure 6-7. Confidence interval for availability results

Keen Independent telephone survey effort successfully reached 17,052 business establishments — a very large number of firms for this type of research. Of those businesses, 2,143 were available for participating entity contracts. If the results are treated as a sample, the reported 37.2 percent representation of MBE/WBEs among all available firms is accurate within about +/-0.6 percentage points.

Similarly, if the overall availability results for firms owned by persons with a disability were treated as a sample, the reported 5.9 percent representation of this group among all available firms is accurate within about +/- 0.3 percentage points.

By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5.0 percentage points. (Keen Independent applied a 95 percent confidence level and a finite population correction factor when determining these confidence intervals.)

In sum, it is reasonable to view the quality of the availability data as approaching that of a “population” of available firms.

Statistical confidence in utilization results. Keen Independent also attempted to compile a complete “population” of State contracts for the study period above \$10,000 (and subcontracts of any size). The study team successfully examined each contract in the study period included in the data and was able to code firms receiving those contracts as minority-owned (by group), white women-owned or majority-owned. The study team coded each firm as to whether it was owned by persons with disabilities or was LGBT-certified. There was no sampling of the contract data.

The State also reviewed firm ownership information. Although inaccuracies in ownership information are possible, those inaccuracies would more likely occur for the smallest contracts and would therefore not materially affect utilization results.

In sum, it is appropriate to use the utilization results as highly accurate information reflecting a population of State contracts. Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant,” especially for prime contracts. The primary limitation in the utilization analysis is incomplete information for the subcontracts involved in State construction contracts. It was not possible to report the share of subcontracts for which data were obtained as the State does not maintain a list of these subcontracts.

Additional analysis of statistical confidence in results of the disparity analysis. As outlined below, the study team also used a sophisticated statistical simulation tool to examine whether there were a sufficient number of contracts and subcontracts examined to be confident that results indicating disparities could not be easily replicated by chance in contract awards.

Monte Carlo analysis. One can be more confident in making certain interpretations from the disparity results if they are not easily replicated by chance in contract awards. For example, if there were only 20 State contracts examined in the disparity study, one might be concerned that any resulting disparity might be explained by random chance in the award of those contracts.

Figure 6-8 describes Keen Independent’s use of Monte Carlo analysis to statistically examine this issue.

Results. Figure 6-9 presents the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for MBEs and WBEs for all contracts.

The Monte Carlo simulations did not replicate the disparity for MBEs in any of the 10,000 simulation runs (note the “0” simulations that replicated the disparity in the third row of Figure 6-9). The disparity for MBEs is statistically significant, and one can reject chance in contract awards as the explanation of the disparity.

None of the 10,000 simulations replicated the disparity for white women-owned firms (also a “0” in the third row of Figure 6-9).

None of the simulations replicated the disparity for businesses owned by persons with disabilities, also shown in Figure 6-9.

The simulations for WBEs and firms owned by persons with disabilities indicate that these results are statistically significant and that one can reject chance in contract awards as the explanation of these disparities.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion elsewhere in this chapter), and it may not be appropriate for very small populations of firms.²

Figure 6-8. Monte Carlo analysis

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

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

The Monte Carlo simulation repeated the above process for all State procurements. The output of a single simulation represented the simulated percentage of State procurement dollars going to MBEs.

The entire Monte Carlo simulation for State procurements was then repeated 10,000 times. The combined output from all 10,000 simulations represented a probability distribution of the overall utilization of MBEs if procurements were awarded randomly based on the availability of businesses working in relevant Colorado industries.

Keen Independent could then determine the probability that the observed disparities in MBE utilization could be replicated by chance in procurement awards.

This process was also conducted for WBEs and firms owned by persons with disabilities.

² Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

Figure 6-9.
 Monte Carlo results for MBEs, WBEs and businesses owned by persons with disabilities for State procurements, July 2014–June 2018

	MBE	WBE	Businesses owned by persons with disabilities
Disparity index	32	27	3
Utilization	5.09 %	3.28 %	0.37 %
Number of simulations less than or equal to observed utilization	0	0	0
Percentage of simulations less than or equal to observed utilization	< 0.1 %	< 0.1 %	< 0.1 %
Reject chance as an explanation	Yes	Yes	Yes

Source: Keen Independent Research from Monte Carlo model for State contracts.

CHAPTER 7.

Further Exploration of HUB Utilization and Availability for State Contracts

Building upon the analysis presented in Chapter 6, Keen Independent further examines the utilization of MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses for different types and sizes of State procurements in Chapter 7.

Chapter 7 analysis of MBE/WBE utilization includes results for:

- A. Prime contracts;
- B. Subcontracts;
- C. Disparity analysis for State prime contracts and subcontracts;
- D. Disparity analysis for State prime contracts and subcontracts by industry; and
- E. Large and small procurements.

The availability and disparity results in Parts C and D of this Chapter use the same methodology for availability and disparity analyses that are described in Chapters 5 and 6.

A. Prime Contracts

Keen Independent analyzed participation of MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses as prime contractors on State contracts and procurements. Results for “prime contracts” include any direct contract award to a company in any industry regardless of whether that contract had any subcontractors.

Figure 7-1 on the following page presents the utilization of minority- and women-owned firms (top portion of the table) for State prime contracts during the study period. The bottom portion of the table provides utilization for firms owned by persons with disabilities, LGBT-certified firms and small businesses. The results in Figure 7-1 combine prime contracts for each industry examined in the study.

As shown in the top portion of Figure 7-1, Asian American-owned firms received \$89.2 million in prime contracts from July 2014 through June 2018, which accounted for 2.9 percent of total prime contract dollars. About 1.5 percent of State prime contract dollars went to Hispanic American-owned firms. African American-owned firms obtained about 0.4 percent of prime contract dollars in the study period. One tenth of 1 percent of prime contract dollars went to Native American-owned firms.

White women-owned businesses obtained \$89.6 million of prime contracts, or about 2.9 percent of total dollars. In total, minority- and women-owned firms received 7.7 percent of State prime contract dollars examined for the study period.

Three rows at the bottom of Figure 7-1 show results specific to firms owned by persons with disabilities, LGBT-certified businesses and small businesses. The dollar amount of procurements for each group is also expressed as a percentage of the total dollars of the \$3 billion of prime contracts. In Figure 7-1 and each of the other tables and graphs in Chapter 7, a firm can be counted in more than one group (for example, as a WBE, a firm owned by a person with a disability and a small business).

As shown in the bottom portion of Figure 7-1, businesses that Keen Independent identified as owned by persons with disabilities received about \$11.4 million (0.4%) of the prime contract dollars examined in this study.

Small businesses obtained \$929 million or about 30 percent of State prime contract dollars during the study period.

Figure 7-1.

Utilization of MBE/WBEs, businesses owned by persons with disabilities, LGBT-certified businesses and small businesses as prime contractors in State of Colorado contracts, July 2014–June 2018

	Prime contracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	127	\$ 10,645	0.35 %
Asian American-owned	843	89,200	2.89
Hispanic American-owned	379	45,944	1.49
Native American-owned	34	3,209	0.10
Total MBE	1,383	\$ 148,998	4.83 %
WBE (white women-owned)	1,642	89,649	2.91
Total MBE/WBE	3,025	\$ 238,647	7.74 %
Total majority-owned	17,845	2,843,685	92.26
Total	20,870	\$ 3,082,332	100.00 %
Owned by persons with disabilities			
LGBT-certified	5	541	0.02
Small business	11,903	929,541	30.16

Note: *Number of prime contracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

Among the prime contracts examined, there was very little utilization of firms that were LGBT-certified (\$541,000 or 0.02% of the total). The very small number of prime contracts going to LGBT-certified companies (only five) precluded further examination for each industry.

Construction. Figure 7-2 examines utilization of MBE/WBEs, firms owned by persons with disabilities and small businesses as prime contractors on construction contracts. MBEs received 3.8 percent of construction dollars and WBEs received 2.4 percent of those dollars. Most of the participation of MBEs was from Hispanic American-owned companies.

Businesses that Keen Independent identified as owned by persons with disabilities received about \$8.5 million (1.2%) of the \$687 million in State construction prime contracts dollars examined in this study. Small businesses accounted for 45 percent of construction prime contract dollars.

Figure 7-2.

Utilization of MBE/WBEs, businesses owned by persons with disabilities and small businesses as prime contractors in State of Colorado construction contracts, July 2014–June 2018

	Prime contracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	18	\$ 2,541	0.37 %
Asian American-owned	14	2,272	0.33
Hispanic American-owned	73	19,046	2.77
Native American-owned	11	2,554	0.37
Total MBE	116	\$ 26,413	3.84 %
WBE (white women-owned)	179	16,149	2.35
Total MBE/WBE	295	\$ 42,562	6.19 %
Total majority-owned	1,761	644,646	93.81
Total	2,056	\$ 687,208	100.00 %
Owned by persons with disabilities	34	\$ 8,475	1.23 %
Small business	1,659	310,433	45.17

Note: *Number of prime contracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

Construction-related professional services. Figure 7-3 outlines participation of MBE/WBEs, firms owned by persons with disabilities and small businesses as prime consultants on construction-related professional services contracts. MBE/WBE utilization was 9.6 percent for construction-related professional services prime contracts. Participation was highest for Asian American-owned firms (5.9%) and white women-owned firms (1.9%).

Firms owned by persons with disabilities received 0.03 percent of construction-related professional services prime contract dollars. Small businesses received about 22 percent of total prime contract dollars in this industry.

Figure 7-3.

Utilization of MBE/WBEs, businesses owned by persons with disabilities and small businesses as prime contractors in State of Colorado construction-related professional services contracts, July 2014–June 2018

	Prime contracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	3	\$ 139	0.02 %
Asian American-owned	165	36,883	5.90
Hispanic American-owned	59	11,124	1.78
Native American-owned	0	0	0.00
Total MBE	227	\$ 48,145	7.70 %
WBE (white women-owned)	165	11,714	1.87
Total MBE/WBE	392	\$ 59,859	9.57 %
Total majority-owned	2,074	565,379	90.43
Total	2,466	\$ 625,238	100.00 %
Owned by persons with disabilities	2	\$ 206	0.03 %
Small business	1,126	136,805	21.88

Note: *Number of prime contracts and other procurements.
Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

Prime contracts in other industries. For the remaining industries examined in this study (other professional services, goods, other services and brokerage and investment services), four subcontracts were identified across all contracts combined, so the results presented for those industries in Chapter 6 can be reasonably viewed as for prime contracts only. There is no difference in percentage utilization by group including or excluding those four subcontracts.

B. Subcontracts

Keen Independent was able to compile data for 718 subcontracts on State contracts during the study period (see Appendix C). Figure 7-4 shows participation of MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses as subcontractors). As with Figures 7-1 through 7-3, a firm can be counted in more than one group (as a minority-owned firm or a white woman-owned company *and* as a firm owned by a person with a disability *and* as a small business).

- In total, 27 percent of subcontract dollars went to MBE/WBEs. Most of this participation was Hispanic American- and white women-owned firms. Hispanic American-owned firms obtained about \$9.9 million (9.7%) in subcontract dollars and WBEs obtained about \$14.7 million (14.5%) of subcontract dollars. Asian American-owned firms received 2.1 percent of subcontract dollars, and utilization of African American- and Native American-owned firms was less than 1 percent for each of those groups.
- Businesses owned by persons with disabilities received about \$0.3 million (0.3%) of subcontract dollars on State contracts.
- There were no subcontracts identified as going to LGBT-certified firms.
- Small businesses accounted for 71 percent of subcontract dollars.

Figure 7-4.

Utilization of MBE/WBEs, businesses owned by persons with disabilities, LGBT-certified businesses and small businesses as subcontractors in State of Colorado contracts, July 2014–June 2018

	Subcontracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	15	\$ 715	0.70 %
Asian American-owned	10	2,134	2.10
Hispanic American-owned	63	9,873	9.71
Native American-owned	10	434	0.43
Total MBE	98	\$ 13,156	12.95 %
WBE (white women-owned)	127	14,686	14.45
Total MBE/WBE	225	\$ 27,842	27.40 %
Total majority-owned	493	73,785	72.60
Total	718	\$ 101,627	100.00 %
Owned by persons with disabilities			
LGBT-certified	0	0	0.00
Small business	614	72,312	71.15

Note: *Number of subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

Subcontracts on construction contracts. Figure 7-5 examines utilization of MBE/WBEs, firms owned by persons with disabilities and small businesses as subcontractors on construction contracts. MBEs received 10.9 percent of construction subcontract dollars and WBEs received 16.6 percent of those dollars. Most of the participation of MBEs was from Hispanic American-owned firms (9.3%).

Businesses owned by persons with disabilities received about \$0.3 million (0.3%) of the State construction subcontract dollars examined. Small business accounted for 74 percent of those subcontract dollars.

Figure 7-5.

Utilization of MBE/WBEs, businesses owned by persons with disabilities and small businesses as subcontractors in State of Colorado construction contracts, July 2014–June 2018

	Subcontracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	13	\$ 569	0.72 %
Asian American-owned	4	222	0.28
Hispanic American-owned	59	7,417	9.33
Native American-owned	10	434	0.55
Total MBE	86	\$ 8,642	10.87 %
WBE (white women-owned)	113	13,160	16.56
Total MBE/WBE	199	\$ 21,802	27.43 %
Total majority-owned	433	57,674	72.57
Total	632	\$ 79,476	100.00 %
Owned by persons with disabilities	3	\$ 268	0.34 %
Small business	546	59,029	74.27

Note: *Number of prime contracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

Subcontracts on construction-related professional service contracts. Keen Independent was able to identify 82 subcontracts for State construction-related professional services contracts. Figure 7-6 outlines participation of different groups in those subcontracts.

- MBE/WBE subcontract utilization was 27.6 percent for construction-related professional services contracts. Participation was highest for Hispanic American-owned firms (11.3%) and Asian American-owned businesses (8.8%).
- There were no subcontracts going to firms identified as owned by persons with disabilities.
- Small businesses received 61 percent of subcontract dollars for construction-related professional services contracts.

Figure 7-6.

Utilization of MBE/WBEs, businesses owned by persons with disabilities and small businesses as subcontractors in State of Colorado construction-related professional services contracts, July 2014–June 2018

	Subcontracts		
	Number of procurements*	\$1,000s	Percent of dollars
Business ownership			
African American-owned	2	\$ 146	0.67 %
Asian American-owned	6	1,912	8.81
Hispanic American-owned	4	2,456	11.31
Native American-owned	0	0	0.00
Total MBE	12	\$ 4,514	20.79 %
WBE (white women-owned)	13	1,478	6.81
Total MBE/WBE	25	\$ 5,992	27.59 %
Total majority-owned	57	15,724	72.41
Total	82	\$ 21,716	100.00 %
Owned by persons with disabilities	0	\$ 0	0.00 %
Small business	65	13,231	60.93

Note: *Number of prime contracts and other procurements.
Numbers may not add to totals due to rounding.

Source: Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

C. Disparity Analysis for State Prime Contracts and Subcontracts

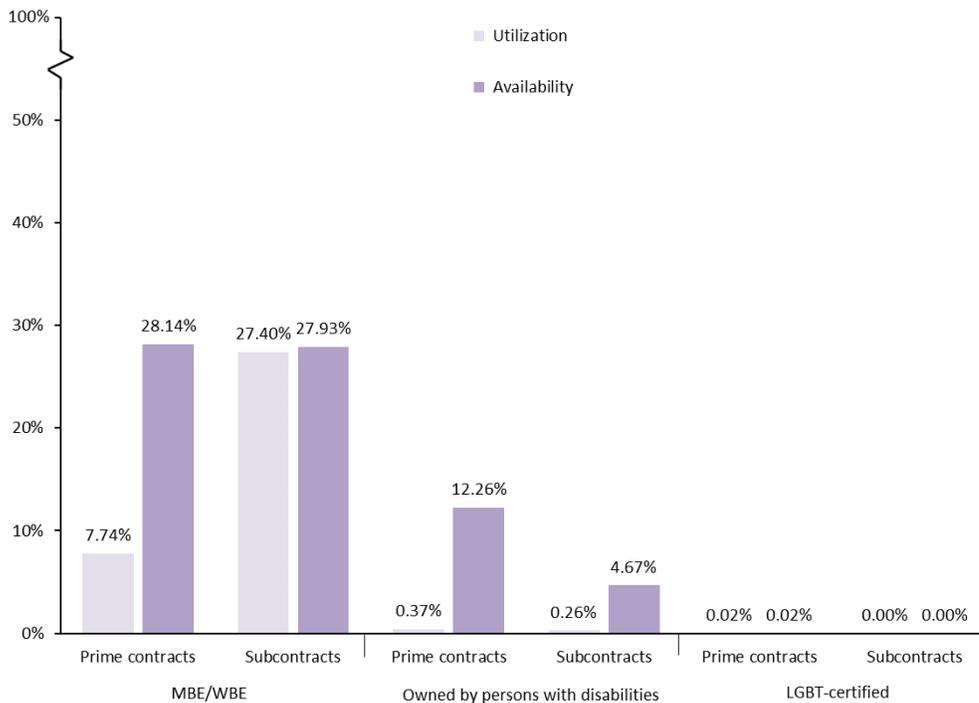
Keen Independent compared the utilization of each group with the availability benchmarks developed for prime contracts and subcontracts for each group.

Summary of the disparity analysis for prime contracts and subcontracts. Figure 7-7 shows results from the disparity analysis.

- The utilization of minority- and women-owned firms in State prime contracts during the study period — about 7.7 percent of total prime contract dollars — was below the 28 percent that might be expected from the availability analysis. For subcontracts, utilization of MBE/WBE firms was 27.4 percent of subcontract dollars, about the same as what might be expected from the availability analysis (27.9%).
- Utilization of firms owned by persons with disabilities was less than 1 percent for both prime contract dollars and subcontract dollars. These results were below availability of those businesses for this work for prime contracts (12%) and subcontracts (5%).
- A small percentage of prime contract dollars went to LGBT-certified firms (0.02%). Since a small number of firms available for those contracts were LGBT-certified, that utilization is comparable to the availability benchmark for those companies. No subcontracts went to LGBT-certified firms.

Figure 7-7.

Utilization and availability of MBE/WBEs, businesses owned by persons with disabilities and LGBT-certified businesses in State of Colorado contracts, July 2014–June 2018



Source: Keen Independent Research utilization and availability analyses for State contracts.

Prime contracts. Keen Independent also examined results for prime contracts and subcontracts for each racial, ethnic and gender group. Figure 7-8 shows results for prime contracts.

Minority-owned businesses. Overall disparity results for MBEs for prime contracts are very similar to those previously presented in Chapter 6. There were substantial disparities for each group except for Asian American-owned firms.

White women-owned firms. About 3 percent of State prime contract dollars went to white women-owned firms, one-quarter of what might be expected from the availability analysis (12%).

Firms owned by persons with disabilities. Businesses that Keen Independent identified as owned by persons with disabilities received 0.37 percent of prime contract dollars, much less than the 12.26 percent that might be expected from the availability analysis.

LGBT-certified firms. As discussed in Chapter 6, utilization and availability were both very low for LGBT-certified companies. There was no disparity based on these limited data. (The disparity index is “107” because the calculation was made with results based on additional decimal places.)

Figure 7-8.

Disparity analysis of State of Colorado prime contracts, July 2014–June 2018

	Prime contracts		Disparity index
	Utilization	Availability	
Business ownership			
African American-owned	0.35 %	5.69 %	6
Asian American-owned	2.89	2.15	135
Hispanic American-owned	1.49	5.31	28
Native American-owned	0.10	2.98	3
Total MBE	4.83 %	16.13 %	30
WBE (white women-owned)	2.91	12.01	24
Total MBE/WBE	7.74 %	28.14 %	28
Owned by persons with disabilities	0.37 %	12.26 %	3
LGBT-certified	0.02	0.02	107

Note: Disparity index = 100 x Utilization/Availability.

Note that the utilization and availability statistics are rounded to the nearest hundredth of a percent, but the disparity indices were calculated from non-rounded results.

Source: Keen Independent Research utilization and availability analyses for State contracts.

Subcontracts. Keen Independent presents disparity results for subcontracts by group in Figure 7-9.

- There were substantial disparities for African American- and Native American-owned firms and for firms owned by persons with disabilities.
- Asian American-owned businesses received 2.10 percent of subcontract dollars, more than what might be expected from the availability analysis (1.55%).
- From July 2014 through June 2018, Hispanic American-owned firms obtained 9.71 percent of State subcontract dollars, more than what might be expected from the availability analysis (7.30%).
- About 14 percent of State subcontract dollars went to white women-owned firms, more than what might be expected from the availability analysis (12.81%).

Figure 7-9.

Disparity analysis of subcontracts on State of Colorado contracts, July 2014–June 2018

	Subcontracts		Disparity index
	Utilization	Availability	
Business ownership			
African American-owned	0.70 %	4.76 %	15
Asian American-owned	2.10	1.55	135
Hispanic American-owned	9.71	7.30	133
Native American-owned	0.43	1.51	28
Total MBE	12.95 %	15.12 %	86
WBE (white women-owned)	14.45	12.81	113
Total MBE/WBE	27.40 %	27.93 %	98
Owned by persons with disabilities	0.26 %	4.67 %	6
LGBT-certified	0.00	0.00	-

Note: Disparity index = 100 x Utilization/Availability.

Note that the utilization and availability statistics are rounded to the nearest hundredth of a percent, but the disparity indices were calculated from non-rounded results.

Source: Keen Independent Research utilization and availability analyses for State contracts.

D. Disparity Analysis for State Prime Contracts and Subcontracts by Industry

Keen Independent examined utilization and availability for prime contracts and subcontracts for the groups of firms and industries with sufficient data to do so.

Prime contracts and subcontracts for State construction contracts. Figure 7-10 shows prime contract and subcontract utilization and availability for State construction contracts. Results are displayed for MBEs (by group), WBEs and firms owned by persons with disabilities. Both utilization and availability were too low to conduct disparity analyses for LGBT-certified firms.

Construction prime contracts. There was a substantial disparity between utilization and availability for construction prime contracts for firms owned by:

- African Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Utilization of Asian American-owned firms exceeded what might be expected from the availability analysis for construction prime contracts.

Construction subcontracts. The bottom half of Figure 7-10 analyzes utilization, availability and disparity results for subcontracts on State construction contracts.

- There were substantial disparities between utilization and availability for firms owned by African Americans and Native Americans.
- Utilization of Asian American-owned firms was below of what might be expected from the availability analysis, but the disparity was not substantial (disparity index of 82).
- Utilization of Hispanic American- and white women-owned firms exceeded what might be expected from the availability analysis for construction subcontracts.

Figure 7-10.
Disparity analysis for State of Colorado construction
prime contracts and subcontracts, July 2014–June 2018

	Utilization	Availability	Disparity index
Prime contracts			
African American-owned	0.37 %	2.68 %	14
Asian American-owned	0.33	0.06	200+
Hispanic American-owned	2.77	8.83	31
Native American-owned	0.37	3.08	12
Total MBE	3.84 %	14.65 %	26
WBE (white women-owned)	2.35	4.73	50
Total MBE/WBE	6.19 %	19.38 %	32
Owned by persons with disabilities	1.23 %	15.24 %	8
Subcontracts			
African American-owned	0.72 %	5.02 %	14
Asian American-owned	0.28	0.34	82
Hispanic American-owned	9.33	7.83	119
Native American-owned	0.55	1.64	33
Total MBE	10.87 %	14.83 %	73
WBE (white women-owned)	16.56	12.07	137
Total MBE/WBE	27.43 %	26.90 %	102
Owned by persons with disabilities	0.34 %	5.24 %	6

Note: Disparity index = 100 x Utilization/Availability.

Note that the utilization and availability statistics are rounded to the nearest hundredth of a percent, but the disparity indices were calculated from non-rounded results.

Source: Keen Independent Research utilization and availability analyses for State contracts.

Prime contracts and subcontracts for State construction-related professional services contracts. Figure 7-11 provides utilization, availability and disparity analysis results for prime contracts and subcontracts on construction-related professional services contracts.

Construction-related professional services prime contracts. There was a substantial disparity between utilization and availability for construction-related professional services prime contracts for firms owned by:

- African Americans;
- Hispanic Americans;
- Native Americans;
- White women; and
- Persons with disabilities.

Utilization of Asian American-owned firms exceeded what might be expected from the availability analysis for construction-related professional services prime contracts.

Construction-related professional services subcontracts. The bottom half of Figure 7-11 shows utilization, availability and disparity results for subcontracts on construction-related professional services contracts.

- There were substantial disparities between utilization and availability for firms owned by African Americans, Native Americans, white women and persons with disabilities.
- Utilization of Asian American- and Hispanic American-owned firms exceeded what might be expected from the availability analysis for these subcontracts.

Figure 7-11.

Disparity analysis for State of Colorado construction-related professional services prime contracts and subcontracts, July 2014–June 2018

	Utilization	Availability	Disparity index
Prime contracts			
African American-owned	0.02 %	10.53 %	0
Asian American-owned	5.90	5.15	115
Hispanic American-owned	1.78	3.20	56
Native American-owned	0.00	0.17	0
Total MBE	7.70 %	19.06 %	40
WBE (white women-owned)	1.87	12.32	15
Total MBE/WBE	9.57 %	31.38 %	31
Owned by persons with disabilities	0.03 %	2.37 %	1
Subcontracts			
African American-owned	0.67 %	3.91 %	17
Asian American-owned	8.81	6.02	146
Hispanic American-owned	11.31	5.50	200+
Native American-owned	0.00	1.07	0
Total MBE	20.79 %	16.50 %	126
WBE (white women-owned)	6.81	14.80	46
Total MBE/WBE	27.59 %	31.30 %	88
Owned by persons with disabilities	0.00 %	2.68 %	0

Note: Disparity index = 100 x Utilization/Availability.

Note that the utilization and availability statistics are rounded to the nearest hundredth of a percent, but the disparity indices were calculated from non-rounded results.

Source: Keen Independent Research utilization and availability analyses for State contracts.

Prime contracts and subcontracts for contracts in other industries. Subcontracting is not usually found in the types of contracts the State awards for goods, other services, and brokerage and investment. Although there might be some subcontracts for other professional services contracts, none were identified in the disparity study. In total, there were only four subcontracts identified for State contracts in all of these industries combined.

The disparity results reported in Chapter 6 for these industries are identical to what the study team identified when removing the few subcontracts from the analysis. As a result, the utilization, availability and disparity analyses presented for other professional services, goods, other services and brokerage and investment contracts in Chapter 6 can be treated as results for prime contracts.

E. Large and Small Procurements

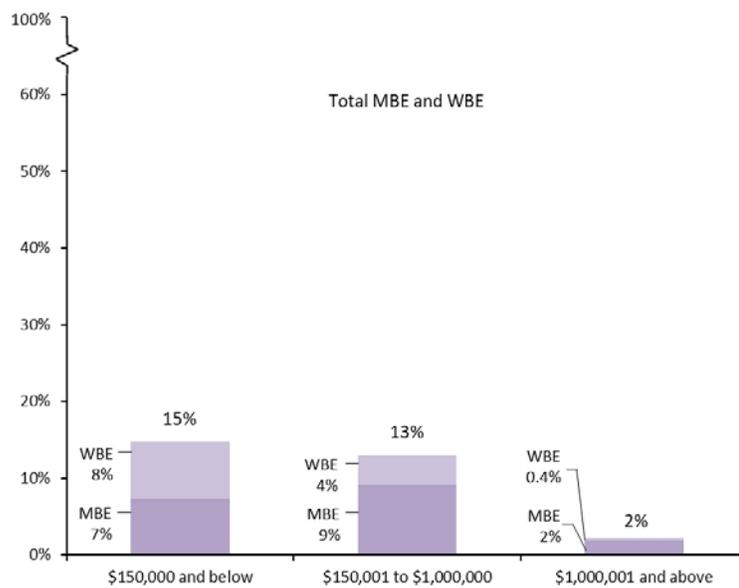
Keen Independent examined whether MBE/WBEs, firms owned by persons with disabilities, LGBT-certified businesses and small businesses participation as prime contractors and vendors varied by size of procurement. The study team reviewed the share of dollars of procurements for those \$150,000 and below, between \$150,001 and \$1,000,000, and \$1,000,001 and above. (These data do not include subcontracts.)

Minority- and women-owned firms. Figure 7-12 shows MBE/WBE participation in State contracts of different sizes. MBE/WBE participation as prime contractors and vendors was highest for purchases under \$150,000 (15%). For purchases between \$150,000 and \$1 million, MBE/WBE utilization was 13 percent; and utilization of MBE/WBEs was lowest for purchases of more than \$1 million (2%).

Figure 7-12.
MBE/WBE participation for State of Colorado prime contracts by size, July 2014–June 2018

Note:
Dark portion of bar is MBE utilization.
Number of procurements analyzed is 18,049 for procurements \$150,000 and below, 2,414 for procurements between \$150,001 and \$1,000,000, and 407 for procurements of \$1,000,001 or more.

Source:
Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

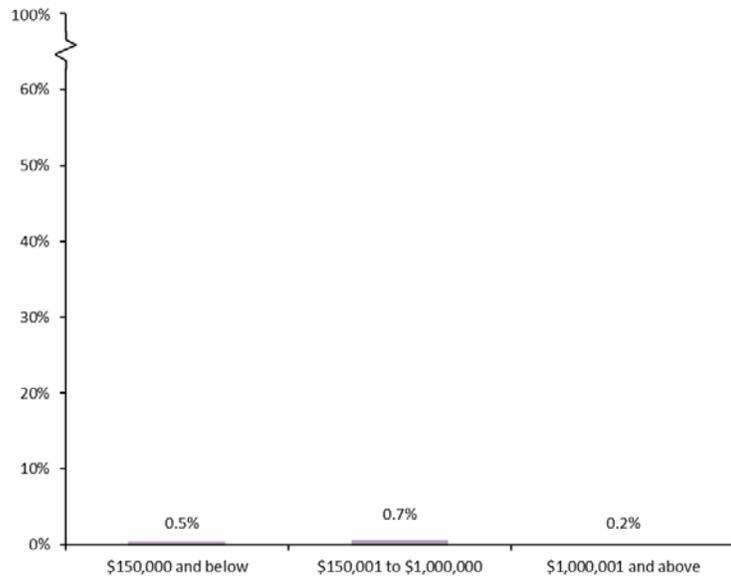


Firms owned by persons with disabilities. Figure 7-13 illustrates the participation of firms owned by persons with disabilities on different sizes of State prime contracts. As with MBE/WBEs, utilization of firms owned by persons with disabilities was lowest for contracts above \$1 million.

Figure 7-13.
Participation of firms owned by persons with disabilities for State of Colorado prime contracts by size, July 2014–June 2018

Note:
Number of procurements analyzed is 18,049 for procurements \$150,000 and below, 2,414 for procurements between \$150,001 and \$1,000,000, and 407 for procurements of \$1,000,001 or more.

Source:
Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.

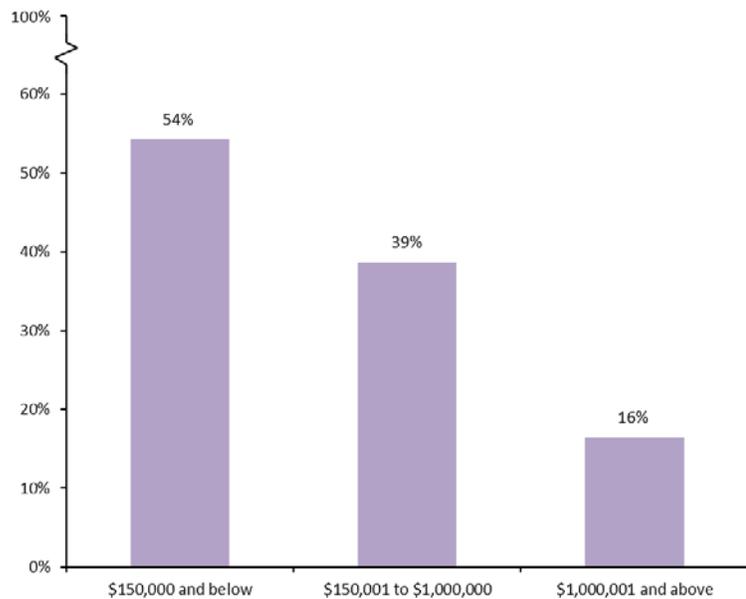


Small business. As demonstrated in Figure 7-14, small business participation was highest for contracts under \$150,000 (54%) and lowest for contracts of more than \$1 million (16%).

Figure 7-14.
Small business participation for State of Colorado procurements by size, July 2014–June 2018

Note:
Number of procurements analyzed is 18,049 for procurements \$150,000 and below, 2,414 for procurements between \$150,001 and \$1,000,000, and 407 for procurements of \$1,000,001 or more.

Source:
Keen Independent Research from State of Colorado procurement data, July 2014–June 2018.



CHAPTER 8.

Summary of Evidence and Program Recommendations

This final chapter of the report summarizes evidence from the disparity study and recommends actions the State might consider based on this information.

Chapter 8 contains three parts:

- A. Summary of evidence from the marketplace and disparity analyses;
- B. Conclusions about the need for race- and gender-conscious programs; and
- C. Recommendations for State consideration.

A. Summary of Evidence from Marketplace and Disparity Analyses

The discussion below presents an overview of study findings with respect to the evidence found in the marketplace analyses and the disparity analyses.

Marketplace analyses. As discussed in Chapter 4 and supporting appendices E through J, the quantitative and qualitative information examined in this study suggests that there is not a level playing field for businesses owned by minorities, women, persons with disabilities and members of the LGBT community in the Colorado marketplace. Among people of color, there was evidence of disparities in the marketplace for African American-, Asian-American-, Hispanic American- and Native American-owned firms. Such information should be considered when interpreting the results of the disparity analysis and considering how the State might respond.

Disparity analyses for minority-owned firms on State contracts. Keen Independent examined State contracts for July 2014 through June 2018. About 5 percent of State contract dollars examined went to minority-owned firms. Results of the disparity analyses are examined in Chapters 6 and 7 and summarized later in this section in Figure 8-5.

- There were substantial disparities between the utilization and availability of African American-, Hispanic American- and Native American-owned firms in construction, construction-related professional services, other professional services, goods and other services contracts.
- For Asian American-owned companies, there was a substantial disparity for other professional services contracts.
- There were substantial disparities for African American-, Hispanic American- and Native American-owned firms in the brokerage and investment industry. Keen Independent did not identify any Asian American-owned firms in Colorado available to perform the types of brokerage and investment contracts procured by the State.

Disparity analyses for white women-owned firms on State contracts. About 3 percent of State contract dollars examined went to white women-owned firms. Results of the disparity analysis were similar to those for MBEs.

- There were substantial disparities between the utilization and availability of white women-owned firms for State contracts in each industry examined in the study.
- The disparities identified for white women-owned firms indicate disadvantages based on gender, which would also apply to firms owned by women of color.

Disparity analyses for firms owned by persons with disabilities. About one-third of 1 percent of State contract dollars went to firms identified as owned by persons with disabilities. Results of the disparity analyses were as follows:

- There were substantial disparities for firms owned by persons with disabilities for State contracts in construction, construction-related services, other professional services, goods and other services.
- For the brokerage and investment industry, Keen Independent did not identify any firms owned by persons with disabilities available to perform the types of contracts awarded by the State.

Disparity analyses for firms owned by members of the LGBT community. Keen Independent also compared utilization and availability for LGBT-certified firms:

- Very little State work went to LGBT-certified firms (0.02% of total contract dollars, which averages to \$200 out of every \$1 million examined).
- Because of the very small number of LGBT-certified firms identified as available for the types of work involved in State contracts, it was difficult to determine whether or not there was a disparity for this group.

Utilization of small businesses. About 31 percent of the dollars of State contracts examined went to companies that appeared to fall under the U.S. SBA definitions for what constitutes a small business.

- About 31 percent of the dollars of State contracts examined went to small businesses.
- Among those small businesses, most of the dollars went to majority-owned firms (79% of small business dollars) with MBE/WBEs accounting for about one-fifth of the total small business participation (21% of small business dollars).

B. Conclusions About the Need for Race- and Gender-Conscious Programs

The disparities identified for minority- and women-owned firms and businesses owned by persons with disabilities occurred even with State efforts to assist small businesses in its procurement.

1. The State is already helping small businesses, including diverse businesses, but with limited tools and resources. For many years, the State has reached out to diverse businesses and other small businesses to help companies learn about and bid on its contracts and subcontracts. It also offers information on technical assistance available for diverse and other small businesses that is provided through other entities. Figure 8-1 provides examples of some of these efforts (in-person events were pre-COVID-19).

In the past three years, the State worked with stakeholders to modernize its State Procurement Code and supporting rules to increase flexibility and transparency in its procurement. In August 2020, Governor Polis' Executive Order D 2020 175 directed DPA and other agencies to review and dismantle barriers in procurement, including those identified as part of the disparity study.

Figure 8-1.

Examples of State of Colorado current assistance to diverse and other small businesses

Examples of actions the State is currently taking to help diverse firms and other small businesses
Directed state agencies to review and dismantle any inequities in agency policies and respond to any systemic procurement equity barriers (Executive Order D 2020 175, Aug. 27, 2020)
Modernized its State Procurement Code (Statutes) effective Aug. 9, 2017 with rules in effect Oct. 1, 2018
Operates the ACCESSColorado program, which explains how to do business with the State through materials on the website, a live webinar each month and in-person presentations
Provides links to resources for business assistance on its website
Attends events and trade shows to distribute materials and explain how to do business with the State
Holds annual Advance Colorado Procurement Expo to connect buyers and sellers for govt. procurement
Hosts a Day at the DOT event to help MBE/WBEs and other firms learn how to do business with CDOT
Helps MBEs, WBEs and veteran-owned businesses navigate certifications and government contracting through Minority Business Office in OEDIT
Operates programs to assist veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs), including a 3% statewide goal for procurement from SDVOSBs
Partners in the Colorado Procurement Technical Assistance Center (PTAC) to help small businesses access federal, state and local government contracts

Source: Keen Independent Research from information provided by State of Colorado.

In addition to these statewide efforts, CDOT operates the Federal Disadvantaged Business Enterprise (DBE) Program on its USDOT-funded contracts. CDOT sets DBE contract goals on certain federally funded contracts and provides supportive services to DBEs.

CDOT's Policy Directive 606.0 "Policy on Fostering Small Business Capacity" (March 23, 2018) includes tailoring and incentivizing contracts to encourage small business participation and expresses the Department's commitment to encourage small business capacity in competing for CDOT contracts. CDOT's Emerging Small Business Program is one element of this program.

This CDOT program was created to increase emerging small business (ESB) prime contracting opportunities, promote and assist ESBs, and increase diversity in the work areas performed by DBEs and ESBs (2 C.C.R. 604-1-4). The strategic intent of the program is to foster the competitive capacity of small businesses in Colorado with the objective of decreasing the cost of construction to public taxpayers.

CDOT-certified ESBs are eligible for evaluation points in point-based contract selections, financial incentives in cost-based contract selections and mentor-protégé programs. CDOT may also elect to restrict the award of contracts or items within contracts to ESBs.

Figure 8-2 further explains this program.

To be eligible for the ESB program, the average annual gross receipts of the business cannot exceed one-half of the U.S. Small Business Administration's small business size standard for that industry. In addition, ESBs are categorized into two levels: Level 1 includes engineering and consulting services firms of less than \$1,000,000 average annual gross receipts and construction or related services firms of less than \$3,000,000 average annual gross receipts. All other ESBs are classified as Level 2 ESBs.

The State has also set an overall goal that at least 3 percent of all contract dollars be awarded to service-disabled veteran-owned small businesses (SDVOSBs) (CRS 24-103-905). The State can use preferences to encourage participation of SDVOSBs. The State requires firms to submit documentation from the U.S. Department of Veterans Affairs verifying that the business is a service-disabled veteran-owned small business to receive any preference. (Utilization and availability analysis for SDVOSBs was not part of the scope of this disparity study.)

Finally, the State has a set-aside program that encourages purchases from non-profit agencies that employ persons with severe disabilities. That program is intended to encourage employment of persons with severe disabilities. (Analysis of the State's utilization of non-profit agencies was not part of the scope of this disparity study.)

Figure 8-2.

CDOT's Emerging Small Business Program

The Emerging Small Business (ESB) program is for eligible small, for-profit businesses that provide construction, design or research services on Colorado Department of Transportation (CDOT) contracts. It is managed by the CDOT Civil Rights & Business Resource Center as a race- and gender-neutral small business program.

This program helps small businesses obtain work on CDOT state-funded construction, professional services and research contracts.

ESB certification applies only to CDOT projects and is not transferable to or used by other agencies. ESB participants are eligible for benefits including financial incentives to primes for utilizing ESB subcontractors/subconsultants, projects restricted for bidding only by ESB firms, tuition reimbursement, company listing in the CDOT public directory and support services. It is available to firms already certified as MBE/SBE/SBEC/WBE.

2. Based on the evidence examined in this study, there is not a level playing field in Colorado for businesses owned by certain groups. Keen Independent identified disparities in the participation of the following businesses in State contracts:

- Businesses owned by African Americans, Hispanic Americans, Native Americans, women and persons with physical or mental disabilities in the construction, construction-related professional services, other professional services, goods and other services industries;
- Asian American-owned businesses that perform other professional services; and
- African American-, Hispanic American-, Native American- and women-owned firms in the brokerage and investment industry.

There is evidence of discrimination for other groups in the Colorado marketplace, including businesses owned by members of the LGBT community, but the results of the disparity analysis for Colorado contracts either did not find disparities for those groups, did not identify firms available for State contracts in certain industries or were otherwise inconclusive.

3. Without further action, disparities in participation of diverse businesses will likely persist.

Keen Independent concludes that the disparities identified in State contracts in this study are likely to persist in coming years without additional action. This is because:

- Where disparities were identified, they were large. In total, minority-owned firms obtained only one-third of the State contract dollars that might be expected based on the availability analysis and white women-owned firms received about one-quarter of the contract dollars expected from the availability analysis. Firms owned by persons with disabilities received just 3 cents out of every dollar anticipated from the availability analysis.

Dollars going to MBE/WBEs would need to increase three- to four-fold to eliminate the observed disparities. Dollars going to firms owned by persons with disabilities would need to increase by a factor of more than 30.

- As discussed earlier in Chapter 8, the State conducts outreach and provides other assistance to diverse businesses and other small businesses in its procurement. These efforts may be very helpful, but alone have shown to be insufficient to eliminate disparities for MBEs, WBEs and businesses owned by persons with disabilities.

MBE/WBEs based on the availability analysis in this study. There were disparities for contracts for which the City's program did not apply, however.¹

Contract goals. Each of the programs examined here use contract goals, where prime contractors must either include a level of participation of a particular group in their bid or proposal that meets the goal set for the contract or show good faith efforts to do so. State and local agencies that operate such programs usually can set 0 percent goals or not set a goal in certain instances (for example, when there are very limited subcontracting opportunities on a contract).

Price or point preferences. Minnesota's Targeted Group Small Business Procurement Program provides one example of price preferences (or other point preferences) for certified firms bidding or proposing on certain procurements. Minnesota's program caps the price preference for a procurement at \$60,000 (no additional preference applies for bids above \$1 million).

Sheltered market or restrictive bidding programs. A sheltered market or restrictive bidding program limits participation in bidding for certain procurements to certified firms. As previously mentioned, the State has such a program for non-profits that employ persons with severe disabilities.

The City and County of Denver has authorized a sheltered market program for Small Business Enterprises (SBEs). This program allows SBE-certified firms to bid and compete against other SBEs, similar to CDOT's ESB program. A portion of the City's contracts are designated for exclusive bidding by SBEs.

5. Addressing disparities needs to be a multi-year, phased effort. Finally, Keen Independent concludes that any State actions to address identified disparities must be part of a sustained, multi-year effort.

- It will take time for the State to put all the needed tools in place.
- The State has decentralized procurement (as do many other states), which might slow implementation of new programs.
- The State's procurement functions must continue to operate while making any changes.
- Building a vendor base of diverse firms and certification of those firms for any new programs occurs over years, not months.
- Some of the diverse firms that might eventually be involved in State contracts and subcontracts are not fully ready to compete for this work.
- CDOT's experience with its ESB Program shows that new programs take time to launch, refine and become effective.

¹ BBC Research & Consulting. (2018). *2018 City and County of Denver Disparity Study* (Rep.).

C. Recommendations for State Consideration

Keen Independent recommends that the State authorize and implement a multi-part program to assist socially and economically disadvantaged businesses for the types of contracts and State agencies examined in this study. Figure 8-4 displays these recommendations. Although some elements could be implemented alone, Keen Independent recommends that the Legislature authorize and fund the program as a whole to ensure a comprehensive approach to addressing the disadvantages for diverse firms identified in this study.

Figure 8-4.
Recommended contract equity program for the State of Colorado

Recommendations
1. Establish policy and overall annual aspirational goals for eligible contracts
<ul style="list-style-type: none"> a. Set separate annual statewide goals for the utilization of the following four groups: MBEs, WBEs, businesses owned by persons with disabilities and firms owned by members of the LGBT community b. Set department-specific goals for all diverse businesses combined c. Implement systems to track and report progress in reaching these goals d. Develop new certification system
2. Remove barriers to small business participation
<ul style="list-style-type: none"> a. Increase the threshold when it requires bid, payment and performance bonds for its contracts b. Address any overly restrictive insurance requirements c. Ensure that evaluation criteria used in qualifications-based awards do not have unintended negative effects on smaller or newer businesses d. Consolidate and simplify the process to register as a potential bidder e. Reach out to expand the number of diverse businesses registered with the State f. Consistently require prime contractors to identify the subcontractors they use on State contracts g. Expand CDOT's subcontractor payment notifications system to other departments
3. Work with partners to increase the readiness of diverse businesses for State contracts
<ul style="list-style-type: none"> a. Continue to partner with others to provide business assistance b. Provide real-time training on how to win and perform State contracts and subcontracts c. Partner with others to provide training and resources for business insurance d. Create bonding assistance program e. Create working capital program for diverse businesses winning State contracts f. Expand CDOT's mentor-protégé program statewide
4. Authorize and implement new equity tools in State procurement
<ul style="list-style-type: none"> a. Implement a contract goals program b. Implement a sheltered market program c. Implement a price and evaluation preference program d. Regularly evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset
5. State agencies that did not participate in the disparity study should conduct their own studies or other comprehensive review of equity in procurement
<ul style="list-style-type: none"> a. The legislative and judicial branches of the State and institutions of higher education that have not reviewed equity in their contracts should do so b. Local governments in Colorado should also review equity in their contracts

1. Establish policy and overall annual aspirational goals for eligible contracts. The study team recommends that the State Legislature establish and fund a comprehensive contract equity program that includes a provision for agency staff to set overall annual aspirational goals for diverse business participation and track that participation.

a. Set separate annual statewide goals for the utilization of the following four groups: MBEs, WBEs, businesses owned by persons with disabilities and firms owned by members of the LGBT community. The goals should be aspirational. They can be initially determined based on the availability data and other information in this study. Goals should be for (a) all firms, regardless of certification, or (b) certified firms.

The goals should be expressed as the percentage of the dollars of contracts (including subcontract dollars) that might be expected to go to each group among “eligible contracts.” Eligible contracts are the types of procurements included in the disparity study, which exclude those typically made from a national market, spending with governments and not-for-profit organizations, spending with companies in publicly regulated markets (private utilities, for example), and other atypical expenditures. (See Chapter 3 for further discussion of what should be excluded from “eligible contracts.”)

Keen Independent recommends that legislation authorize State agency staff to develop the initial goals and periodically refine them based on future availability analyses. (An example of periodic review is CDOT’s overall annual aspirational goals for DBE participation on its USDOT-funded contracts, which need to be prepared every three years.)

b. Set department-specific goals for all diverse businesses combined. Keen Independent recommends that State staff set an annual goal for diverse spending for each department subject to the State Procurement Code. This will require knowledge of each department’s typical spending combined with data on availability of diverse businesses (such as provided in this disparity study). It is most workable for a department to have a combined goal for all diverse businesses because some departments have relatively limited spending. It may be possible for a department to meet a combined goal on an annual basis, but much more difficult to meet separate goals for four groups.

c. Implement systems to track and report progress in reaching these goals. Keen Independent recommends that State agency staff prepare Equity in Contracts Reports each State fiscal year to be submitted to the Governor and Legislature. The reports should provide information by group for each of the industries included in the study, combined utilization of diverse businesses for each department, and changes over time.

The State does not currently have a comprehensive statewide information system for measuring spending on diverse businesses. Overall annual goals are only useful if the State can measure whether it achieved them. It also needs information on the success of its efforts to know whether certain programs are working or might no longer be needed.

d. Develop new certification system. The State will need to certify firms for them to be eligible for any new equity programs that provide preference based on social and economic disadvantage (see equity programs under Recommendation 4 on page 14 of this chapter). Certification can also help the State identify diverse businesses when preparing utilization reports (see Recommendation 1-c).

2. Remove barriers to small business participation. In addition to its current efforts to remove barriers to diverse and other small businesses, interviews with business owners and other information collected in this study suggest that the State should consider the following actions. The following are examples of what the State might consider in order to remove barriers to small business participation in its contracts, and other measures might be effective as well.

a. Increase the threshold when the State requires bid, payment and performance bonds for its contracts. Keen Independent identified bonding requirements as an impediment for diverse businesses to work with public agencies. The Legislature might raise the threshold of construction contracts that require payment and performance bonds from its current level of \$50,000 (perhaps to \$300,000) and periodically adjust that threshold for inflation. The State might also review the threshold for requiring bid bonds.

b. Address any overly restrictive insurance requirements. Insurance requirements on State and other public sector contracts were identified as a barrier to small business participation. This barrier even affected firms potentially available for State subcontracts, as flow-down provisions usually apply regardless of the size of the subcontract. The State should review and attempt to eliminate unnecessarily restrictive insurance requirements based on the size and risks involved in those contracts.

c. Ensure that evaluation criteria used in qualifications-based awards do not have unintended negative effects on smaller or newer businesses. Qualifications criteria such as size, length of time in business and past work with the State can place smaller and newer businesses at a disadvantage when competing for qualifications-based awards. Criteria that consider qualifications and experience of individual staff members of a company (including experience working at other firms) can be more equitable than criteria that solely consider company qualifications. The State should review qualifications criteria to ensure that it does not have measures that have a disproportionate negative effect on diverse businesses.

d. Consolidate and simplify the process to register as a potential bidder. There are multiple procurement systems used by the State, each with its own bidder and vendor registration system, for the agencies under the State Procurement Code. This might confuse and lengthen the process for a potential bidder to become registered with the State. The State should explore changes, including the purchase of a single statewide procurement system, that might allow a vendor to register once for all state agencies.

e. Reach out to expand the number of diverse businesses registered with the State. The State already conducts outreach to diverse and other small businesses. The State can use the database of available firms compiled as part of this disparity study to expand the number of diverse firms registered with the State. It can also purchase or share other firm lists to enhance this outreach. Additional staffing will also be necessary to enhance outreach efforts.

f. Consistently require prime contractors to identify the subcontractors they use on State contracts. Any future efforts to increase opportunities of diverse businesses as subcontractors will require the State to collect information about all subcontractors on its contracts. The State is allowed to obtain subcontract information from prime contractors but does not consistently do so or consolidate this information. Keen Independent recommends that the State collect information

about each subcontract for contracts above a certain size, including data about the subcontractor, type of work performed and dollar amount. The State will then need to develop or purchase information systems to maintain and track such information.

g. Expand CDOT's subcontractor payment notifications system to other departments. Some diverse businesses working as subcontractors reported difficulty being paid by prime contractors. Lack of information about whether a prime contractor's invoice had been paid put the subcontractor at a disadvantage: it would not know if the delay in payment was due to slow payment by the client or by the prime contractor. Some state and local governments have implemented systems that notify subcontractors of when the prime contractor has been paid, or have payments to primes posted on websites that can be accessed by the subcontractor.

CDOT has such a subcontractor notification program. The State should explore whether this can be accomplished in other departments. It will require information systems and additional staff time to implement.

3. Work with partners to increase the readiness of diverse businesses for State contracts. As with the recommendations for expanded business assistance, the initiatives discussed below provide examples of what the State might consider doing to increase the readiness of small and diverse business participation in its contracts. This list is based on interviews with business owners and others and programs implemented by other states and local governments. It is not exhaustive of the possible ways the State could partner with others to assist diverse and other small businesses.

a. Continue to partner with others to provide business assistance. The State partners with PTAC and other groups to provide small business assistance. Keen Independent recommends that these efforts continue or be expanded based on further investigation of any gaps in such assistance.

b. Provide real-time training on how to win and perform State contracts and subcontracts. The State provides on-demand training videos explaining how to do business with state government. The study team recommends that the State expand this type of "just-in-time" training to include specialized assistance in bidding and performing different types of prime contracts and subcontracts.

c. Partner with others to provide training and resources for business insurance. Business insurance was a barrier for diverse businesses and other small businesses. In the services the State and others provide to small businesses, it might develop specialized training and assistance for business insurance.

d. Create bonding assistance program. CDOT partnered with Lockton Companies to launch the Bond Assistance Program in July 2019, a bond guarantee program for emerging prime contractors for construction contracts of \$3 million or less. CDOT provides a guarantee of 50 percent.

Firms certified as ESBs are eligible to participate. A potential participant starts the process by undergoing an assessment of whether it is bondable. A firm can participate in the program on one contract only. The surety fee is 2 percent of the contract, and the ESB must participate in a funds control program with the management company (0.75% fee).

Obtaining bonding through the program also helps a contractor meet CDOT's prequalification requirements to bid on a construction contract. For firms not yet prequalified, it provides proof of bonding. For firms that are prequalified, it can be used to increase the size of a contract on which the firm can bid as a prime.

CDOT reports little program activity to date, potentially because obtaining a bond through this program is relatively costly to the bidder. The State might explore whether the cost of this program can be reduced, especially if it is expanded to other State agencies.

e. Create working capital program for diverse businesses winning State contracts. To address barriers concerning access to capital, the State might consider a program to provide working capital loans to firms otherwise unable to obtain them.

The Wisconsin DOT has operated a working capital loan program since the 1980s. WisDOT provides a loan guarantee and banks issue the loans. DBEs awarded WisDOT contracts or subcontracts can apply for the loan, with the contract and the WisDOT guarantee combining to provide collateral for the loan. Loans can be up to \$200,000. The State of Colorado might consider implementing a similar program.

f. Expand CDOT's mentor-protégé program statewide. CDOT has a program that encourages large businesses to mentor small companies. The State might consider expanding this program across the types of construction and construction-related professional services firms involved in its contracts, and possibly including firms in other industries.

4. Authorize and implement new equity tools in State procurement. Keen Independent recommends that the State review the evidence in this study and consider the following statewide programs:

- Contract goals program;
- Sheltered market program; and
- Price and evaluation preference program.

a. Implement a contract goals program. CDOT operates contract goals programs for DBEs on its USDOT-funded contracts. It also can apply ESB goals for certain contracts. In each program, each prime contractor bidding on a contract with a goal must either include DBE or ESB participation at a level that meets the goal or show that it made good faith efforts to do so. CDOT sets contract goals specific to each contract.

Based on its Uniform Reports, firms certified as DBEs received 12 percent of contract dollars on its Federal Highway Administration-funded contracts for FFY 2013–FFY2017, considerably higher than found in this study for all minority- and women-owned firms (certified and non-certified) on other State construction contracts. Much of CDOT's DBE participation was due to setting DBE contract goals program for those contracts.

The State should consider authorizing a contract goals program for large construction contracts as well as other contracts where there are meaningful subcontract opportunities and operate it in a fashion similar to the DBE and ESB contract goals programs operated by CDOT. Eligibility of different types of firms for the program is discussed in Figure 8-5.

b. Implement a sheltered market program. CDOT also operates a sheltered market program for ESBs on certain small contracts. The State should consider expanding a sheltered market program across its agencies. Under that program, the State would be allowed to solicit bids and proposals from certified firms.

- The State typically publicly advertises procurements of \$25,000 or more through its electronic procurement systems. For purchases under \$25,000, departments can directly make purchases without competition. The State might adopt a policy that staff first consider certified firms for those purchases (based on an electronic list of those firms).
- For purchases between \$25,000 and \$150,000 (the current threshold for formal, advertised requests for offers or requests for proposals), the State might consider operating the sheltered market program where it would seek competitive bids either from certified firms or all small businesses (if there is insufficient availability of certified businesses). It could still use electronic bidding, but only eligible firms would receive solicitations to provide a Documented Quote.

c. Implement a price and evaluation preference program. States such as Minnesota have a price or evaluation preference for certified firms, sometimes with a cap on the amount of price preference that can be considered. For the State of Minnesota, a certified firm is selected for an award if its price is within 6 percent of the low bidder unless the price difference exceeds \$60,000. (Procurement staff for the State of Minnesota can also set a lower price preference depending on the construction, goods or services being purchased.) The State of Minnesota can also give up to 6 out of 100 points to a proposer that is a certified firm on qualifications-based awards.

Keen Independent’s 2017 Minnesota Joint Disparity Study for the State of Minnesota determined that minority- and women-owned firms received 11 percent of State contract dollars even though availability of MBE/WBEs was less than that for the State of Colorado.² (As discussed in Chapter 6, about 8 percent of State of Colorado contract dollars went to minority- and women-owned firms.)

The State of Colorado should consider authorizing a price and evaluation preference program. If it also implements a sheltered market program, the price and evaluation preference program might apply to procurements of at least \$150,000.

d. Evaluate which groups of diverse businesses are eligible for each program and provide for program review or sunset. The State will need to decide the eligibility criteria for any contract goals, sheltered market or preference program based on the evidence in this report and other information available to the State. Participation in those programs would be limited to firms receiving certification

² There were still disparities in the participation of MBE/WBEs in State of Minnesota contracts, but the disparity was not as large as identified for the State of Colorado.
https://mn.gov/admin/assets/KeenIndependentAdminDisparityStudyFullReport03122018_tcm36-331963.pdf

that they meet those criteria. For example, the State might consider a program for socially and economically disadvantaged businesses. Firms would need to meet criteria for both social and economic disadvantage to be certified, as explained below.

Social disadvantage. Programs such as the City and County of Denver’s M/WBE program and the USDOT’s Federal DBE Program operated by CDOT certify firms for participation based in part on social disadvantage. In the Federal DBE Program and Denver’s program, firms that are owned by minorities and women have the rebuttable presumption that they are socially disadvantaged, but other firms can and do become certified as a DBE if they can show they are socially disadvantaged.

Given that broader definition, businesses that have been socially disadvantaged because they are owned by members of the LGBT community could be considered for inclusion in the program on a case-by-case basis if those firms can provide instances of such discrimination. Other firms facing social disadvantage could apply as well.

- **Economic disadvantage.** The second criterion for program participation is whether the firm is economically disadvantaged. A common measure is whether the firm is a small business under U.S. Small Business Administration (SBA) size standards for its industry. This is one of the criteria for economic disadvantage under the USDOT Federal DBE Program. The City and County of Denver program uses SBA size standards as well. CDOT’s ESB program has had a cap on revenue that is one-half of the U.S. SBA size limit, but is considering a new certification category of firms up to the full SBA small business standard.

Some programs also require that the company’s owner has personal net worth below certain caps in order to be deemed to be economically disadvantaged. The USDOT Federal DBE Program currently has a \$1.32 million cap on the personal net worth of the business owner not including the value of the business or primary residence.

Many state MBE/WBE programs do not include a cap on personal net worth.

Figure 8-5 on the following page summarizes results of the disparity analysis by industry for each group of businesses examined in the study. Based on whether or not there was a substantial disparity in State contracts (and considering other information in this study), a group of firms in an industry might be considered to be socially disadvantaged based on their race, ethnicity, gender or other personal characteristics of the group.

For example, Keen Independent identified substantial disparities for African American-owned firms for State contracts for each of the industries examined in the study. Based on those results, other information in the disparity study, and information it may obtain beyond this study, the State might decide to consider African American-owned companies to be socially disadvantaged.

Except for other professional services contracts, there was not a disparity in the utilization of Asian American-owned firms in State contracts. Therefore, the State might decide to presumptively consider Asian American-owned companies to be socially disadvantaged in the other professional services industry, but not in other industries. Such firms could still apply for certification under the

program but would need to demonstrate social disadvantage on an individual basis in their applications.

Further, each applicant for certification would need to demonstrate economic disadvantage. The State might consider using U.S. Small Business Administration size standards (typically based on annual revenue) to determine economic disadvantage. The note “If small” in Figure 8-5 means that a firm might be considered economically disadvantaged if it was below U.S. SBA (or other) standards for being considered a small business.

Figure 8-5.
Implication of disparity results on presumptions of disadvantage

Industry and business ownership	Substantial disparity for State contracts	Presumption of disadvantage	
		Social disadvantage	Economic disadvantage
Construction, Construction-related professional services, Goods, Other services			
African Americans	Yes	Yes	If small
Asian Americans	No	Case-by-case	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Yes	Yes	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small
Other professional services			
African Americans	Yes	Yes	If small
Asian Americans	Yes	Yes	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Yes	Yes	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small
Brokerage and investment			
African Americans	Yes	Yes	If small
Asian Americans	Insufficient information	Case-by-case	If small
Hispanic Americans	Yes	Yes	If small
Native Americans	Yes	Yes	If small
WBE (white women)	Yes	Yes	If small
Persons with disabilities	Insufficient information	Case-by-case	If small
Members of LGBT community	Insufficient information	Case-by-case	If small
Other individuals		Case-by-case	If small

It is important to note that the disparity study might not be the only information the State considers when making the determinations of which groups face social disadvantage.

The legislation authorizing a contract equity program such as described here should include sufficient funding for a successful program and a date that the program will expire unless it is reauthorized. Federal courts have required a sunset clause for such equity programs. Programs can be reauthorized, but usually only based on updated disparity studies and other information about the marketplace. A future disparity study might indicate that certain programs are no longer needed or that stronger measures are warranted. A future study can also provide information that would lead a state to change the groups deemed eligible for certain programs. States with programs often conduct disparity studies every four to five years to provide such information.

5. State agencies that did not participate in the disparity study as well as local governments should conduct their own studies or other comprehensive review of equity in procurement. As explained below, not all state agencies were a part of this study. Also, very few local governments in Colorado have conducted disparity studies and enacted equity programs for their locally funded contracts. Those State agencies as well as Colorado local governments should review equity in their contracts.

a. The legislative and judicial branches of the State and institutions of higher education that have not reviewed equity in their contracts should also do so. Senate Bill 19-135, which authorized the disparity study, required each agency under the State Procurement Code to participate in the study. The statute requiring the study did not apply to the legislative and judicial branches of State government or to institutions of higher education that have elected to be outside the State Procurement Code.³ The disparity results do not include their contracts.

Those entities might consider conducting a joint disparity study or other equity analysis focusing on contracts that were not part of the current study. Much of the information collected in the 2020 State of Colorado Disparity Study might be able to be used in a such a study (including availability and marketplace information), which could reduce the resources needed.

b. Local governments in Colorado should also review equity in their contracts. The City and County of Denver and Denver Public Schools are two examples of local governments that have conducted disparity studies and enacted programs for their locally funded contracts. Most other local governments in Colorado have not.

Because marketplace conditions in Colorado appear to place diverse businesses at a disadvantage in public sector procurement, there may be disparities for diverse firms in local government contracts that are similar to those for the State. Individual or joint disparity studies or other assessments could determine whether equity programs might be supportable for those local governments.

³ The 2020 State of Colorado Disparity Study applies to all executive agencies and community colleges of the State as well as institutions of higher education that have not opted out of the State Procurement Code. Judicial and legislative branches of the State of Colorado are not included in the study.

APPENDIX A.

Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2020 State of Colorado Disparity Study. The following definitions are only relevant in the context of this report.

A&E. “A&E” refers to architecture and engineering (i.e., “A&E contracts”). Architectural and engineering services are classified as part of “construction-related professional services” in this study.

Anecdotal evidence. Anecdotal or “qualitative” evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee’s or participant’s perspective.

Availability analysis. The availability analysis examines the number of historically underutilized businesses (HUBs) ready, willing and able to perform specific types, sizes and locations of construction, construction-related professional services, brokerage and investment services, other professional services, goods and other services contracts and subcontracts for the State of Colorado.

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to HUBs based on analysis of the specific type, location, size and timing of each State of Colorado contract and subcontract and the relative number of HUBs available for that work.

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

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

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

Certified MBE or WBE. A firm certified as a minority- or woman-owned business. Without the word “certified” in front of “MBE” or “WBE,” Keen Independent is referring to a minority- or woman-owned firm that might or might not be certified as such.

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 www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR.

Construction-related professional services. Construction-related professional services include architecture and engineering, surveying, real estate consulting and related work.

Contract. A contract is a legally binding agreement between the purchaser and seller of goods or services.

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

Contract goals program. A program in which a public agency sets a percentage goal for participation of DBEs, MBE/WBEs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.

Consultant. A consultant is an individual or a business performing services under professional services contracts.

Contractor. A contractor is a business performing services under construction contracts.

Controlled. A business is controlled by the individual or entity exercising management and executive authority for the business.

Disadvantaged Business Enterprise (DBE). A “DBE” is a firm certified as such. A small business that is 51 percent or more owned and controlled by one or more U.S. citizens or permanent residents who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26) can be certified as a DBE. Members of certain racial and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of social disadvantage. Women are also presumed to be socially disadvantaged. Examination of economic disadvantage includes investigating 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). Determination of small business status is based upon the firm’s three-year average gross receipts compared with the SBA table of size standards and an overall DBE program cap currently set at \$24.1 million.

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

A business owned by a nonminority male may also be certified as a DBE on a case-by-case basis if the business meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

Disparity. A disparity is an inequality, difference, or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial or ethnic group and an outcome for non-minorities may constitute a disparity. This study examines whether a disparity exists between the percentage of State contract dollars going to historically underutilized businesses (HUBs) and the percentage that might be expected to go to HUBs based on the relative number of those firms ready, willing and able to perform different types, sizes and locations of State contracts.

Disparity analysis. 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 historically underutilized businesses (HUBs) is one tool used to examine whether there is evidence consistent with discrimination against such businesses.

Disparity index. A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity” or utilization “on par” with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). D&B Hoovers is the D&B company that provides these lists. Obtaining a DUNS number, a unique nine-digit identifier for businesses, and being listed by D&B is free to listed companies. Companies are not required to pay to be listed in its database.

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

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

Establishment. See business establishment.

Federal 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.

Federally funded contract. A federally funded contract is any contract or project funded in whole or in part (a dollar or more) with U.S. Department of Transportation, U.S. Environmental Protection Agency, U.S. Department of Housing and Urban Development or other federal financial assistance, including loans.

Firm. See business.

Fiscal year. The State’s fiscal year is the time period from July 1 through June 30 of the following year. For example, FY 2020 is the twelve-month period ending on June 30, 2020.

Historically underutilized business (HUB). A HUB is a business that is at least 51 percent owned and controlled by a U.S. Citizen or permanent resident who controls both the management and day-to-day business decisions and is one or more of the following:

- Members of a racial or ethnic minority group;
- Non-Hispanic Caucasian women;
- Persons with physical or mental disabilities; or
- Members of the lesbian, gay, bisexual and transgender (LGBT) community.

Industry. For the purpose of this study, an industry refers to businesses within one of the following economic sectors: construction, construction-related professional services, brokerage and investment, other professional services, goods and other services.

Legal framework. Legal framework is the relevant case law used as the basis for study methodology.

Local agency. A local agency is any public sector entity that is a political subdivision of the state government.

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).

Market area. The market area is the geographic area from which the State makes most of its purchases, based on dollars. Also, see “relevant geographic market area.”

MBE. Minority-owned business enterprise. See minority-owned business.

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

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans (Latinos), 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 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, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia or Hong Kong and persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

Minority-owned business (MBE). An MBE, sometimes referred to as a minority-owned business, is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, “MBE-certified businesses” are those that have been certified by a government agency as a minority-owned company.

Neutral remedy. Actions that remove barriers, open opportunities, and strengthen businesses without regard to race, ethnicity, or gender.

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.

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>.

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.

Persons with physical or mental disabilities. A person with a physical or mental disability is someone who has an impairment that substantially limits one or more major life activity. This disability might substantially limit his or her ability to engage in competitive business.

Prime contract. A prime contract is a contract between the customer (e.g., the State of Colorado) and a business.

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for a client such as the State of Colorado. See Professional Services.

Prime contractor. A prime contractor is a construction firm that performs a prime contract for a client such as the State of Colorado.

Procurement. A direct purchase, consulting agreement, prime contract, subcontract or other acquisition of construction, professional services, goods or other services. This term is intended to encompass all types of government purchasing and contracting through any acquisition method. It is synonymous with “contract” in this report.

Professional services. Professional services are types of work in the service sector requiring special training. Some professional services require holding professional licenses such as certified public accountants and attorneys.

Project. A project refers to a State of Colorado or local agency construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are activities or programs in which businesses owned by certain minority groups or women may participate but majority-owned firms typically may not. An MBE/WBE contract goal program is one example of a race- and gender-conscious measure.

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

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race, ethnicity 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.”

Racial or ethnic minority group. See minorities.

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most Colorado procurement dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to race- and gender-conscious programs requires disparity analyses to focus on the “relevant geographic market area.”¹ Also, see “market area.”

Remedial measure. A remedial measure, sometimes shortened to “remedy,” is an action designed to address barriers to full participation of a targeted group.

Remedy. See remedial measure.

SBA. See Small Business Administration.

SBA 8(a). SBA 8(a) is a U.S. Small Business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

Small business. A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. “Small business” does not necessarily mean that the business is certified as such. Keen Independent used U.S. Small Business Administration standards for revenue to determine the businesses that were “small businesses.”

¹ See, e.g., *Crosby*, 448 U.S. at 509; 49 CFR Section 26.35; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

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

Small Business Enterprise (SBE). A firm certified as a small business enterprise by a local, state or federal agency according to the size criteria of the certifying agency.

Standard Industrial Classification (SIC Code). An SIC code is a four-digit numerical code system developed by the U.S. Government to identify the primary line of business of a company or business establishment.

State-funded contract. A state-funded contract is any State contract or project that is entirely funded with State of Colorado funds. For the purposes of this study, a federally funded contract includes at least \$1 of federal funds.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant's contract for a client such as the State of Colorado.

Subcontract. A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of the prime contractor's contract for a client such as the State of Colorado.

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

Subindustry. For this study, a specialized industry within one of the following six broader economic sectors: construction, construction-related professional services, brokerage and investment, other professional services, goods and other services.

Subrecipient. A subrecipient is a local government or agency receiving financial assistance passed through another agency. For example, if a local government in Colorado receives USDOT funds through the Colorado Department of Transportation, it is a subrecipient of those monies.

Substantial disparity. Several courts have held that a "substantial disparity" is one where the disparity index is less than 80, which can indicate evidence of discrimination affecting the outcome.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project or sells supplies directly to the State of Colorado.

United States Environmental Protection Agency (EPA). In addition to administering federal regulations regarding environmental protection, the EPA provides funds that support state and local infrastructure projects and other contracts. The EPA has certain requirements regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-assisted contracts for construction, equipment, services and supplies.

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project residents in those contracts.

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 and the Federal Aviation Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Railroad Administration (at the time of this report).

Utilization. Utilization refers to the percentage of total contract dollars of a particular type of work going to a specific group of businesses (for example, MBEs or WBEs).

Vendor. A vendor is a business that is providing goods or services to a customer such as the State of Colorado.

WBE. Woman-owned business enterprise. See women-owned business.

Women-owned business (WBE). For purposes of this study, a WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are nonminority women. A business need not be certified as such to be counted as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a “WBE-certified business” is one certified as a woman-owned firm.

APPENDIX B.

Legal Framework and Analysis

Prepared by Holland & Knight LLP

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program¹ and the implementation of the Federal DBE Program by local and state governments. The Federal DBE Program recently was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).² Most recently, in October 2018, Congress passed the FAA Reauthorization Act, which continues the Federal DBE and ACDBE Programs.³ The appendix provides a summary of the legal framework for the disparity study as applicable to the State of Colorado.

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, MBE/WBE/DBE Programs, the Federal DBE Program and its implementation by state and local governments, and the strict scrutiny analysis. The State of Colorado is within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit. This analysis reviews the Tenth Circuit Court of Appeals decisions in *Adarand Constructors, Inc. v. Slater* (“*Adarand VII*”),⁶ *Concrete Works of Colorado, Inc.*

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

² Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

³Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

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

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

⁶ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

*v. City and County of Denver*⁷ regarding MBE/WBE/DBE programs, the Federal DBE Program, and local and state government recipients of federal funds in their implementation of the Federal DBE Program. The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study.

In addition, the analysis reviews in Section F below other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, which are informative to the study, including: *Orion Insurance Group, and Ralph Taylor v. Washington State Office of Minority and Women's Business Enterprises, U.S. DOT, et al.*⁸, *Dunnet Bay Construction Co. v. Illinois DOT*,⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*,¹⁰ *Western States Paving Co. v. Washington State DOT*,¹¹ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹² *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,¹³ *Northern Contracting, Inc. v. Illinois DOT*,¹⁴ *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹⁵ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁶ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁷ *Geod Corporation v. New Jersey Transit Corporation*,¹⁸ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁹

⁷ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari; *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994).

⁸ *Orion Insurance Group, Taylor v. WSOMWBE, U.S. DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

⁹ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir., 2015).

¹⁰ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, F.3d 1187, (9th Cir. 2013).

¹¹ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

¹² *Mountain West Holding Co., Inc. v. Montana*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum, (Not for Publication) U.S. Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

¹³ *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹⁴ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹⁵ *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

¹⁶ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). Midwest Fence filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, see 2017 WL 511931 (Feb. 2, 2017), which was denied, 2017 WL 497345 (June 26, 2017).

¹⁷ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

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

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

The analyses of these and other recent cases summarized below, including the Tenth Circuit decisions in *Adarand Constructors, Inc. v. Slater* and *Concrete Works of Colorado v. City and County of Denver*, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs, the Federal DBE Program and its implementation by local and state governments, disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

These cases also are instructive with regard to the legal framework applicable to historically underutilized business (“HUB”) in connection with and as defined pursuant to Colorado Revised Statutes (C.R.S.) Title 24-103-1001, 1002, and 1003 (see C.R.S. 24-103-1001, -1002, and -1003 below).²⁰ In addition, they are applicable in terms of the preparation of a report to assist in considering whether changes, if any, may be appropriate regarding state policies affecting HUBs relating to C.R.S. 24-103-1001, -1002 and -1003.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including those relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,²¹ and the Federal DBE Program that was continued and reauthorized by the Fixing America’s Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority- and women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.²² At the time of this report, Congress was considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

As stated above and shown in detail below in Section D and E, these cases in the Tenth and other Federal Circuit Courts of Appeal establish legal standards for satisfying the strict scrutiny test regarding whether there is the “compelling governmental interest” in a state’s marketplace to have a narrowly tailored race and ethnic conscious MBE/WBE/DBE program, that the state MBE/WBE/DBE Program is “narrowly tailored,” and the standard relevant to cases involving challenges to MBE/WBE/DBE Programs and their implementation by state and local governments.

The Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater (Adarand VII)*²³ (see Section D below) 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. Thus, the court held that the strict scrutiny standard of analysis was satisfied.

²⁰ Colorado Revised Statutes, Title 24, Article 103, Part 10 (C.R.S. 24-103-1003) (SB 19-135), Ch. 379, p. 3415, Section 1, effective July 1, 2019.

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

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

²³ 228 F.3d 1147 (10th Cir. 2000).

In *Concrete Works* (see Section D below) 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. Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver.²⁴ The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures.²⁵ The Court 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.”²⁶ The Court 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.²⁷ The Court 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.²⁸

Denver, the Court held, introduced evidence of discrimination against each group included in the ordinances.²⁹ The Court held that Denver was not required to demonstrate that private firms directly and intentionally engaged in any discrimination in which Denver passively participates. 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.”³⁰ Thus, the Court held Denver could introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link its spending to that discrimination.³¹

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities.³² Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. Denver was not required to show discriminatory motive or intent on the part of private construction firms, to identify any specific practice or policy that resulted in discrimination, or to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities.³³

²⁴ 321 F.3d 950, 954 (10th Cir. 2003).

²⁵ *Id.* at 957-58, 959.

²⁶ 488 U.S. 469, 492 (1989) (plurality opinion).

²⁷ *Id.* at 958.

²⁸ *Id.*

²⁹ *Id.* at 971.

³⁰ *Id.* at 971, quoting *Croson*, 488 U.S. 503.

³¹ *Id.*

³² *Id.*, citing *Croson*, 488 U.S. at 503.

³³ *Id.* at 972.

The Court found sufficient the evidence Denver presented on marketplace discrimination.³⁴ The court held “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.”³⁵ 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.”³⁶

The Court found that Denver demonstrated its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it had become a passive participant in that discrimination.³⁷ The Court 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.³⁸ The Court held Denver’s disparity studies were not required to specifically identify those individuals or firms responsible for the discrimination.³⁹

The Court pointed out the disparity studies upon which Denver relied properly measured discrimination in the overall Denver MSA construction industry, and not discrimination by the City itself.⁴⁰ The Court noted the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.⁴¹

In *Adarand VII*, Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.⁴² The Court found it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally. The Court stated Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”⁴³

Also, significantly, the Tenth Circuit in connection with disparity studies held courts should consider relevant lending discrimination studies, business formation studies, and 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.⁴⁴

³⁴ *Id.* at 973.

³⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

³⁶ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

³⁷ *Id.* at 973.

³⁸ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

³⁹ *Id.*

⁴⁰ *Id.* at 974.

⁴¹ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

⁴² *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

⁴³ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

⁴⁴ *Id.* at 979-80.

The federal courts in other jurisdictions have applied the strict scrutiny standard to state and local government programs implementing the Federal DBE Program and considered disparity studies and the evidentiary basis for their race, ethnic and gender-based programs. In *Western States Paving*, an instructive case as to the sufficiency of the evidence to establish strict scrutiny, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT's DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race-conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."⁴⁵ Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.⁴⁶

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al., ("AGC, SDC v. Cal. DOT" or "Caltrans")*, the Ninth Circuit in 2013 upheld the validity of California DOT's DBE Program implementing the Federal DBE Program, and found that Caltrans followed the standards set forth in the *Western States Paving* case. The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program is constitutional.⁴⁷ The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.⁴⁸

⁴⁵ *Western States Paving*, 407 F.3d at 996; *see, also*, Br. for the United States, at 28 (April 19, 2004).

⁴⁶ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

⁴⁷ *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing, on other grounds* Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

⁴⁸ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

In addition, recently the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*⁴⁹ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*⁵⁰ upheld the implementation of the Federal DBE Program by the Illinois DOT.⁵¹ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.⁵² The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.⁵³

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.⁵⁴ 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.”⁵⁵ 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.⁵⁶ The Court also found there were only generalized allegations of societal and industry discrimination coupled with

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

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

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

⁵² *Id.*

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

⁵⁴ 488 U.S. 469 (1989).

⁵⁵ 488 U.S. at 500, 510.

⁵⁶ 488 U.S. at 480, 505.

positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.⁵⁷

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.⁵⁸ But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”⁵⁹

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”⁶⁰ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”⁶¹

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”⁶² 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.”⁶³

⁵⁷ 488 U.S. at 507-510.

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

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

⁶⁰ 488 U.S. at 502.

⁶¹ *Id.*

⁶² 488 U.S. at 509.

⁶³ *Id.*

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”⁶⁴ “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”⁶⁵

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁶⁶

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

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

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

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

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

⁶⁴ 488 U.S. at 509.

⁶⁵ *Id.*

⁶⁶ 488 U.S. at 492.

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.⁶⁷ 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.⁶⁸

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.⁶⁹ 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.⁷⁰ 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.⁷¹

It is instructive to review the type of evidence utilized by Congress and specifically considered by the Tenth Circuit in *Adarand VII* and other federal courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁷² The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (e.g., disparity

⁶⁷ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁶⁸ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁶⁹ *Id.*

⁷⁰ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁷¹ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁷² *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000)); *Western States Paving*, 407 F.3d at 992-93.

studies).⁷³ The evidentiary basis on which Congress relied to support its finding of discrimination, and recognized by the Tenth Circuit, 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.⁷⁴
- **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.⁷⁵
- **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.⁷⁶
- **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.⁷⁷
- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of

⁷³ See, e.g., *Adarand VII*, 228 F.3d at 1167–76 (10th Cir. 2000); see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁷⁴ *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁷⁵ *Adarand VII*, at 1170-72 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237.

⁷⁶ *Id.* at 1172-74 (10th Cir. 2000); see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁷⁷ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); see, *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

the Federal DBE Program.⁷⁸ Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.⁷⁹

The Federal DBE Program

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally funded contracts.⁸⁰ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998–2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five-year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFE’TEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁸¹ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁸² Most recently, in October 2018, Congress passed the FAA Reauthorization Act.⁸³

It is instructive to the study to review the Federal DBE Program and its implementation by state and local governments. Many state and local governments have MBE/WBE/DBE Programs that are similar to the Federal program. And, as noted above, many of the most recent cases involve challenges to the implementation of the federal program by state and local governments.

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not

⁷⁸ Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁹ *Id.* at § 1101(b)(1).

⁸⁰ *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

⁸¹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁸² Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁸³ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.⁸⁴

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government can follow in establishing a goal. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient of federal funds and is set forth in detail in the federal regulations, including 49 CFR § 26.45 and 49 CFR §§23.41-51.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE Program. In summary, the recipient establishes a base figure for relative availability of DBEs.⁸⁵ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁸⁶ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁸⁷ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁸⁸ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁸⁹

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁹⁰ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁹¹

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁹²

⁸⁴ 49 CFR § 26.51. *See*, 49 CFR §23.25.

⁸⁵ 49 CFR § 26.45(a), (b), (c).

⁸⁶ *Id.*

⁸⁷ *Id.* at § 26.45(d).

⁸⁸ *Id.*

⁸⁹ 49 CFR § 26.45(b)-(d).

⁹⁰ 49 CFR § 26.51.

⁹¹ 49 CFR § 26.51(b).

⁹² 49 CFR §§ 26.61-26.73.

F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.⁹³ Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁹⁴

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

- Extends the FAA DBE and ACDBE programs for five years.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

- (1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.
- (2) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits. This testimony and documentation show that race- and gender-neutral efforts alone are insufficient to address the problem.
- (3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.

⁹³ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

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

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

“Fixing America’s Surface Transportation Act” or the “FAST Act” (December 4, 2015)

On December 3, 2015, the “Fixing America’s Surface Transportation Act” or the “FAST Act” was passed by Congress, and it was signed by the President on December 4, 2015, as the new five-year surface transportation authorization law. The FAST Act continues the Federal DBE Program and makes the following “Findings” in Section 1101 (b) of the Act:

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

Therefore, Congress in the FAST Act found based on testimony, evidence and documentation as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.⁹⁵

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

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

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”⁹⁶

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.⁹⁷ The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”⁹⁸ The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis . . .,” noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”⁹⁹ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”¹⁰⁰

As stated above, it is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and significantly for purposes of this study the implementation by local and state governments and agencies of their DBE Programs, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts also have held that Congress had ample evidence of discrimination in

⁹⁵ *Id.*

⁹⁶ 76 F.R. at 5092.

⁹⁷ 76 F.R. at 5095.

⁹⁸ 76 F.R. at 5095.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).¹⁰¹

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race-ethnic- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.¹⁰² If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹⁰³ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."¹⁰⁴

¹⁰¹ *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *See Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376. In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe's* Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study — relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program — was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. *see, also*, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government's evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

¹⁰² *See AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VIP")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3^d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3^d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

¹⁰³ *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3^d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3^d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁴ *See, e.g., Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3^d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3^d Cir. 1993); *see also Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.¹⁰⁵ It is well established that “remediating the effects of past or present racial discrimination” is a compelling interest.¹⁰⁶ In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”¹⁰⁷

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”¹⁰⁸ “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’”¹⁰⁹ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹¹⁰

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹¹¹ Once the governmental entity has shown acceptable proof of a compelling interest and remediating past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.¹¹² Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party

¹⁰⁵ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁶ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); *see Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁷ *Croson*, 488 U.S. at 500; *see e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁸ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe v. NCDOT*, 615 F.3d 233 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal, Inc.*, 2014 WL 1309092 (D. Minn. 2014); *see also, Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁹ *See, e.g., Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187 (9th Cir. 2013); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed* 840 F.3d 932 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 973 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹¹⁰ *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹¹¹ *Adarand Constructors, Inc. v. Peña*, (“*Adarand III*”), 515 U.S. 200 at 235 (1995); *See, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹¹² *Majeske*, 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, *affirmed*, 840 F.3d 932; *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993)

challenging the application of a DBE, ACDBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.¹¹³

To successfully rebut the government's evidence, the courts hold, including the Tenth Circuit Court of Appeals in *Concrete Works v. City and County of Denver* and *Adarand Contractors v. Slater*, that a challenger must introduce "credible, particularized evidence" of its own that rebuts the government's showing of a strong basis in evidence for the necessity of remedial action.¹¹⁴ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.¹¹⁵ Conjecture and unsupported criticisms of the government's methodology are insufficient.¹¹⁶ The courts, including the Tenth Circuit in *Concrete Works*, have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.¹¹⁷

The courts have stated that "it is insufficient to show that 'data was susceptible to multiple interpretations,' instead, plaintiffs must 'present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.'"¹¹⁸ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers "both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself."¹¹⁹

¹¹³ *Id.*; *Adarand VII*, 228 F.3d at 1166.

¹¹⁴ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁵ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹¹⁶ See e.g., *H.B. Rowe v. North Carolina DOT* 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁷ *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 W.L. 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁸ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

¹¹⁹ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”¹²⁰ The Tenth Circuit in *Concrete Works* and other courts 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.¹²¹ Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹²² It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹²³

The courts, including the Tenth Circuit in *Concrete Works* and *Adarand VII*, have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹²⁴ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹²⁵

Thus, the Tenth Circuit and other courts hold that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.¹²⁶ The court in *Concrete Works* found that it was not required to attempt to craft a ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark, and other courts have stated the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.”¹²⁷

¹²⁰ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993);

¹²¹ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958; see, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²² *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²³ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²⁴ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹²⁵ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, also *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹²⁶ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹²⁷ *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *H. B. Rowe*, 615 F.3d at 241. (internal quotation marks omitted).

The Tenth Circuit Court of Appeals in *Concrete Works* applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures.¹²⁸ 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.”¹²⁹ 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.¹³⁰

The Tenth Circuit held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination.¹³¹ 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.’”¹³² (plurality opinion). Furthermore, the Court of Appeals stated 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.¹³³

The Tenth Circuit in *Concrete Works* 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.¹³⁴ The Court of Appeals said that once Denver met its burden, Concrete Works Company (“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.”¹³⁵ (internal citations and quotations omitted). The Court of Appeals found 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.”¹³⁶ The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances.¹³⁷

¹²⁸ *Concrete Works*, 321 F.3d 950, at 957-58, 959 (10th Cir. 2003).

¹²⁹ 488 U.S. 469, 492 (1989) (plurality opinion).

¹³⁰ *Concrete Works*, 321 F.3d 950, at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

¹³¹ *Id.*

¹³² *Id.*, quoting *Croson*, 488 U.S. at 509

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Concrete Works*, 321 F.3d 950, 958 (10th Cir. 2003) (internal citations and quotations omitted).

¹³⁷ *Id.* at 960.

The Tenth Circuit found 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.¹³⁸ The Tenth Circuit, quoting its 1994 decision in *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.”¹³⁹

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.¹⁴⁰ 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.”¹⁴¹

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 race or ethnic conscious remedial program (i.e., to prove a compelling governmental interest), or in connection with a state government recipient complying with the Federal DBE Program, to prove narrowly tailoring of program implementation by a state government. “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.”¹⁴²

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.¹⁴³ 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.¹⁴⁴ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹⁴⁵

¹³⁸ *Id.* at 970.

¹³⁹ *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994).

¹⁴⁰ *Id.* at 97, quoting *Croson*, 488 U.S. at 500.

¹⁴¹ *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

¹⁴² *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954; *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹⁴³ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works IP”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁴ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁵ *Western States Paving*, 407 F.3d at 1001.

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹⁴⁶ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹⁴⁷ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹⁴⁸
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹⁴⁹
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹⁵⁰ 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.”¹⁵¹
- **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.¹⁵²

¹⁴⁶ See, e.g., *Crosen*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁷ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting, *Crosen*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹⁵⁰ See, e.g., *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹⁵¹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹⁵² See, e.g., *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct.; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

In terms of statistical evidence, Courts have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence,” but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹⁵³

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.¹⁵⁴ The Court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The Court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.¹⁵⁵ 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.”¹⁵⁶ 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.”¹⁵⁷

The Court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.¹⁵⁸ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹⁵⁹

Additionally, the Court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹⁶⁰ Thus, the Court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹⁶¹

¹⁵³ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rotbe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁵⁴ 321 F.3d at 973.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹⁵⁷ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹⁵⁸ *Id.* at 973.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁶¹ *Id.*

The Court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹⁶² 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.¹⁶³

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹⁶⁴ (“[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.*”¹⁶⁵ Further, the Court pointed out that it earlier rejected the argument CWC reasserted 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.”¹⁶⁶ 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.¹⁶⁷

Consistent with the Court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.”¹⁶⁸ The Tenth Circuit ruled that the local government can demonstrate that it is a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹⁶⁹

The Court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹⁷⁰

¹⁶² *Id.* at 974.

¹⁶³ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁶⁴ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁶⁷ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

¹⁶⁸ *Id.*

¹⁶⁹ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹⁷⁰ *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 local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.¹⁷¹

In *Concrete Works*, Denver 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. 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.”¹⁷² In *Adarand VII*, the Court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.”¹⁷³

The Tenth Circuit in *Concrete Works* concluded that discriminatory motive can be inferred from the results shown in disparity studies. 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.”¹⁷⁴

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The Court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”¹⁷⁵

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹⁷⁶

¹⁷¹ *Id.* at 977.

¹⁷² *Id.* at 977-78.

¹⁷³ *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13

¹⁷⁴ *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

¹⁷⁵ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹⁷⁶ *Id.* at 979-80.

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.¹⁷⁷ But, the courts point out, including the Tenth Circuit, that personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁷⁸ It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."¹⁷⁹

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.¹⁸⁰

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.¹⁸¹

¹⁷⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹⁷⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁷⁹ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁸⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1198; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993). For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁸¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

The anecdotal evidence, according to the Tenth Circuit, presented in *Concrete Works* included several incidents involving “profoundly disturbing” behavior on the part of lenders, majority-owned firms, and individual employees.¹⁸² 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 Concrete Works (“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 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.¹⁸³

The Tenth Circuit 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.¹⁸⁴

After considering Denver’s anecdotal evidence, the district court in *Concrete Works* 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.¹⁸⁵ Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the Tenth Circuit concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden.¹⁸⁶

b. The Narrow Tailoring Requirement.

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

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

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

¹⁸² *Concrete Works*, 321 F.3d at 989.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073.

¹⁸⁶ *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”).

- The impact of a race-, ethnicity- or gender-conscious remedy on the rights of third parties.¹⁸⁷

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁸⁸

Implementation of the Federal DBE Program: Narrow tailoring.

The second prong of the strict scrutiny analysis, as discussed above, requires the implementation of the Federal DBE Program by state governments and recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state government’s or recipient’s transportation contracting and procurement market.¹⁸⁹ The cases considering challenges to a state government’s implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard.

¹⁸⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rotbe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513 (10th Cir. 1994); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁸⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornbass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁸⁹ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

In *Western States Paving*, the Ninth Circuit held the state DOT or recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity- or gender-conscious remedial action.¹⁹⁰ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁹¹

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.¹⁹²

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁹⁶ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁹⁷

¹⁹⁰ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁹¹ *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

¹⁹² 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁹³ 473 F.3d at 722.

¹⁹⁴ *Id.* at 722.

¹⁹⁵ *Id.* at 723-24.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et. al.* and *Midwest Fence Corp. v. U.S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in Northern Contracting that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁹⁸ The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.¹⁹⁹ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.²⁰⁰ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.²⁰¹

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

The courts, including the Tenth Circuit, require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.²⁰² 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.²⁰³

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting.’”²⁰⁴

¹⁹⁸ *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁹⁹ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

²⁰⁰ *Id.*

²⁰¹ 840 F.3d 932 (7th Cir. 2016).

²⁰² See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n*, 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

²⁰³ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 2005 WL 13892 (11th Cir. 2005); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

²⁰⁴ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, quoting *Adarand Constrs., Inc.*, 515 U.S. at 237-38.

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.”²⁰⁵ Courts, including the Ninth Circuit, have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”²⁰⁶

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.’”²⁰⁷

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*²⁰⁸ 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.”²⁰⁹ The Court found that the District failed to show it seriously considered race-neutral measures.

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

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”²¹⁰

²⁰⁵ *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).

²⁰⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

²⁰⁷ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

²⁰⁸ 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

²⁰⁹ 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

²¹⁰ *Croson*, 488 U.S. at 509-510.

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.²¹¹

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.”²¹²

²¹¹ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

²¹² *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

It is noteworthy that the federal regulations and the courts require that state governments and recipients of federal financial assistance governed by 49 CFR Part 26 and 49 CFR Part 23 implement or seriously consider race-, ethnicity- and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.²¹³ The courts also have found the regulations require a state to meet the maximum feasible portion of its overall goal by using race neutral means.²¹⁴

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.²¹⁵ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;²¹⁶ (2) good faith efforts provisions;²¹⁷ (3) waiver provisions;²¹⁸ (4) a rational basis for goals;²¹⁹ (5) graduation provisions;²²⁰ (6) remedies only for groups for which there were findings of discrimination;²²¹ (7) sunset provisions;²²² and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.²²³

²¹³ 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” See, 49 CFR § 23.25; see, e.g., *Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that 10 years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

²¹⁴ See, e.g., *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 CFR § 26.51(a)); see, 49 CFR § 26.51; 49 CFR § 23.25.

²¹⁵ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

²¹⁶ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

²¹⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

²¹⁸ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

²¹⁹ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

²²⁰ *Id.*

²²¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossman Contracting Co., Inc., v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), aff’d 345 F.3d 964.

²²² See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

²²³ *Coral Constr.*, 941 F.2d at 925.

It is significant that several federal court decisions have upheld the Federal DBE Program and its implementation by state governments and recipients of federal funds, including satisfying the narrow tailoring factors.²²⁴

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Tenth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.²²⁵ The Tenth Circuit has applied “intermediate scrutiny” to classifications based on gender.²²⁶ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.²²⁷

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.²²⁸

²²⁴ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VIP*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

²²⁵ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); See generally, *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); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

²²⁶ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

²²⁷ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, *Serr. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

²²⁸ *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc.*

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.²²⁹

Intermediate scrutiny, as interpreted by the federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.²³⁰ 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.²³¹

Certain courts have held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²³²

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

v. The Mayor and City Council of Baltimore, et al., 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

²²⁹ *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender-based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

²³⁰ See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

²³¹ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

²³² 122 F.3d at 929 (internal citations omitted.)

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²³³

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”²³⁴ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.²³⁵ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.²³⁶

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.²³⁷ Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.²³⁸ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.²³⁹ The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.²⁴⁰ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

²³³ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

²³⁴ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²³⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²³⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²³⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.²⁴¹ When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.²⁴²

The courts in Colorado and the Tenth Circuit Court of Appeals in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”²⁴³ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²⁴⁴

Under the rational basis test, “a statutory classification is presumed constitutional and does not violate equal protection unless it is proven beyond a reasonable doubt that the classification does not bear a rational relationship to a legitimate legislative purpose.”²⁴⁵ “[T]he burden is on claimant, as the challenging party, to prove the statute is unconstitutional beyond a reasonable doubt.”²⁴⁶

In applying rational basis review, “we do not decide whether the legislature has chosen the best route to accomplish its objectives.”²⁴⁷ Instead, “[o]ur inquiry is limited to whether the scheme as constituted furthers a legitimate state purpose in a rational manner.”²⁴⁸

²⁴¹ *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Colorado Insurance Guaranty Association v. Sunstate Equipment, LLC*, 405 P.2d 320, 328-329, 331-332 (Colo. App. 2016); *Sanchez v. Industrial Claim Appeals Office of Colorado*, 411 P.2d 245, 252 (Colo. App. 2017); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254.

²⁴² See, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988).

²⁴³ See, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); see, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Zerba v. Dillon Companies, Inc.*, 292 P.3d 1051, 1055 (Colo. 2012); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity).

²⁴⁴ *Id.*, *Zerba v. Dillon Companies, Inc.*, 292 P.3d 1051, 1055 (Colo. 2012); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993));

²⁴⁵ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017), quoting, *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 506 (Colo. 1997).

²⁴⁶ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017), quoting, *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005), aff’d on other grounds sub nom. *City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006).

²⁴⁷ *Sanchez v. Industrial Claim Appeals Office*, 411 P.3d 245 (2017) quoting, *Dean v. People*, 366 P.3d 593 (2016).

²⁴⁸ *Id.*

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²⁴⁹ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.”²⁵⁰

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²⁵¹

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”²⁵²

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”).²⁵³

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²⁵⁴

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.²⁵⁵ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²⁵⁶

²⁴⁹ *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *Gray v. Commonwealth of Virginia*, 274 Va. at 308-9, 645 S.E. 2d at 460.

²⁵⁰ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

²⁵¹ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012).

²⁵² *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

²⁵³ 2012 WL 5939228 (Fed. Cl. 2012).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors” Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²⁵⁷ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors”²⁵⁸

4. Colorado Revised Statutes: Title 24; Article 103; Part 10. Procurement Disparity Study (SB 19-135), ch. 379, p. 3413-15, Section 1, effective July 1, 2019.

In 2019, the Colorado legislature passed a new Title 24, Article 103, Part 10 entitled Procurement Disparity Study. The legislation added 24-103-1001-1003 as follows:

Colorado Revised Statutes Annotated > TITLE 24. GOVERNMENT — STATE > PROCUREMENT CODE > ARTICLE 103. SOURCE SELECTION AND CONTRACT FORMATION > PART 10. PROCUREMENT DISPARITY STUDY

24-103-1001. Legislative declaration

- (1) The general assembly hereby finds, determines, and declares that:
 - (a) It is imperative and the public policy of Colorado that the state procurement process be free from bias so that all qualified persons and entities may compete for state business;
 - (b) A fair procurement process not only ensures justice and fairness in state contracting but will broaden the procurement contractor pool, which will result in efficiencies statewide and, as warranted, promote the growth of historically underutilized businesses, thereby creating jobs and stimulating the state’s economy;
 - (c) Although studies establishing discrimination in procurement for certain industries or in certain localities have been conducted, a comprehensive analysis of state contracts awarded to historically underutilized businesses has not yet been commissioned;
 - (d) The United States supreme court has recognized that disparity studies are tools that seek to qualify and quantify past discrimination and recommend certain corrective measures as may be warranted by the study’s findings;

²⁵⁷ *Id.*

²⁵⁸ *Id.*

- (e) Therefore, it is the intent of the general assembly, consistent with the code’s stated policies of ensuring the fair and equitable treatment of persons who deal with the procurement system and fostering effective broad-based competition within the free enterprise system, that an independent study be commissioned to:
 - (i) Determine the frequency with which state contracts are awarded to historically underutilized businesses and the monetary amounts of such awards, compared to the frequency and size of contracts awarded to other businesses; and
 - (ii) To the extent that the study establishes that disparities attributable to past or present discrimination exist or inhere in the state procurement process, to recommend remedial measures to address the effects of that discrimination.

(SB 19-135), ch. 379, p. 3413, Section 1, effective July 1 (2019). C.R.S. 24-103-1002.

24-103-1002. Definitions.

As used in this part 10, unless the context otherwise requires:

- (1) “Contract” has the same meaning as set forth in section 24-101-301 (9) and includes public-private partnerships and other agreements for public-private financing.
- (2) “Contractor” means any person who is a party to a contract.
- (3) “Historically underutilized business” means a business:
 - (a) That is at least fifty-one percent owned by one or more individuals who are:
 - (i) United States citizens or permanent resident aliens; and
 - (ii) One or more of the following:
 - (A) Members of a racial or ethnic minority group;
 - (B) Non-Hispanic Caucasian women;
 - (C) Persons with physical or mental disabilities; or
 - (D) Members of the lesbian, gay, bisexual, and transgender community; and
 - (b) For which the minority ownership controls both the management and day-to-day business decisions.
- (4) “Persons with physical or mental disabilities” means persons who:
 - (a) Have impairments that substantially limit one or more major life activities.
 - (b) Are regarded generally by the community as having a disability; and

- (c) Whose disabilities substantially limit their abilities to engage in competitive business.
- (5) “Racial or ethnic minority group” means:
 - (a) African American persons, meaning individuals having origins in any of the black racial groups;
 - (b) Hispanic American persons, including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (c) Asian American persons, including persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, the United States territories of the Pacific, or the Northern Mariana Islands; or persons whose origins are from subcontinent Asia, including persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal; or
 - (d) Native American persons, including persons who are American Indians, Eskimos, Aleuts, or Hawaiians of Polynesian descent.
- (6) “Subcontractor” means any person who is a party to a contract with a contractor.

(SB 19-135), ch. 379, p. 3414, Section 1, effective July 1 (2019). C.R.S. 24-103-1002.

24-103-1003. Disparity study — report

- (1)(a) The executive director shall commission a state disparity study regarding the participation of historically underutilized businesses in state contracts entered into by all principal departments of the executive branch of state government as specified in section 24-1-110, including any division, office, agency, or other unit created within a principal department and including institutions of higher education and the Colorado commission on higher education; except that the study shall not include those entities that have elected to be exempt from the code pursuant to section 24-101-105 (1)(b). The study shall include state contracts entered into during the 2014-15, 2015-16, 2016-17, and 2017-18 state fiscal years.
- (b)
 - (i) The study must be conducted, and a final report prepared, by an entity independent of the department that is selected in response to a request for proposal issued in accordance with this code.
 - (ii) The entities subject to the study pursuant to subsection (1)(a) of this section shall cooperate fully with the independent contractor engaged to conduct the study.

- (c) The study and final report setting forth the study’s methodologies, findings, and recommendations must be provided by December 1, 2020, to:
 - (i) The members of the general assembly; and
 - (ii) The executive director, who shall transmit a copy of the disparity study final report produced pursuant to this section to the director of the minority business office created in section 24-49.5-102, which shall post the report on that office’s official website.
 - (d) The executive director or the executive director’s designee shall include the findings and recommendations from the final report required by subsection (1)(c) of this section in its report to the applicable house and senate committees of reference required by the “State Measurement for Accountable, Responsive, and Transparent (SMART) Government Act,” part 2 of article 7 of title 2.
- (2)(a) The purposes of the disparity study undertaken pursuant to this section are:
- (i) To determine whether there is a disparity between the number of qualified historically underutilized businesses that are ready, willing, and able to perform state contracts for goods and services, and the number of such contractors actually engaged to perform such contracts, which information must be ascertained by evaluating the prime contracts and subcontracts awarded in the following industries:
 - (A) Construction, including new construction, remodeling, renovation, maintenance, demolition and repair of any public structure or building, pipeline construction, and other public improvements;
 - (B) Architecture and engineering, including construction management, landscape architecture, planning, surveying, mapping services, and design, build, and construction services;
 - (C) Professional services, including legal services, accounting, information technology services, medical services, technical services, research planning, and consulting services;
 - (D) Brokerage and investment, including banking, asset management, state retirement, and pension services; and
 - (E) Goods and services that may be provided or performed without professional licensure or special education or training, including, but not limited to, goods and services relating to materials, supplies, equipment, maintenance, personnel, pharmaceuticals, and food;

- (ii) To determine whether, of the total amount spent on state contracts in a fiscal year, there is a disparity between the percentage of spending attributable to contracts awarded to qualified historically underutilized businesses and the percentage of state contracts that were awarded to historically underutilized businesses in that fiscal year; and
 - (iii) To determine what changes, if any, should be made to state policies affecting historically underutilized businesses.
- (b) The disparity study must specifically include the following analyses, both for the historically underutilized businesses as a group and for each subgroup, as set forth in section 24-103-1002 (3)(a)(II):
- (i) A prime contractor utilization analysis that presents the distribution of prime contracts by industry;
 - (ii) A subcontractor utilization analysis that presents the distribution of subcontracts by the industries described in subsection (2)(a)(I) of this section;
 - (iii) A market area analysis that presents the legal basis for the geographical market area determination and defines the state’s market area;
 - (iv) A prime contractor and subcontractor availability analysis that presents the distribution of available businesses in the state’s market area;
 - (v) A prime contractor disparity analysis that presents prime contractor utilization compared to prime contractor availability by industry and determines whether the comparison is statistically significant;
 - (vi) A subcontractor disparity analysis that presents subcontractor utilization compared to subcontractor availability by industry and determines whether the comparison is statistically significant;
 - (vii) A qualitative analysis that presents the business community’s experiences and perceptions of barriers encountered in contracting or attempting to contract with the state; and
 - (viii) Recommendations regarding best management practices and ways to enhance Colorado’s contracting and procurement activities with historically underutilized businesses.
- (c)
- (i) Any conclusion that discrimination-related disparity exists between the availability and utilization of historically underutilized businesses must be supported by statistical evidence and may be supplemented or supported by anecdotal evidence.

- (ii) If the analysis supports a finding that such disparity exists, the report must include recommendations to address the disparity, including any statutory changes likely to cure, mitigate, or redress such disparity. Any proposed remedial measures must be tailored to address documented statistical disparities in procurement policies.
- (3) The general assembly may annually appropriate to the department of personnel such amount as it deems appropriate for the purposes specified in this part 10. Any unexpended and unencumbered money from an appropriation made for the purposes of this part 10 remains available for expenditure by the department for the purposes of this part 10 in the next fiscal year without further appropriation.

(SB 19-135), ch. 379, p. 3415, Section 1, effective July 1 (2019). C.R.S. 24-103-1003.

5. Pending Cases (at the time of this report)

There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019. This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District) issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has recently dismissed the appeal by MTA and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied without prejudice the Motion to Exclude Proof based on the lack of authority to limit the County's ability to present proof at trial due to the non-party MTA's failure to meet its discovery obligations, that nothing in the record attributes MTA's failure to meet its discovery obligations to the County, and that MTA's efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA's appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: "Now that the Ninth Circuit has dismissed MTA's appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose."

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September.

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission. The County advises that the Commission will vote on this matter on October 26, 2020. If approved by the County, the parties will then submit a proposed Order of Settlement to the court to conclude the matter.

Thus, at the time of this report the case in federal court in Tennessee remains pending until and if the settlement is approved. Trial had been scheduled for December 14, 2020, which is subject to change given the status of the litigation.

Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc., Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also has denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020 and ordered that MTA's Motion to Dismiss shall be scheduled for a hearing at a date mutually agreeable to the parties.

At the time of this report, MTA had filed a Motion to Dismiss the Second Amended Complaint. The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

The court also ordered that MTA and the County file a discovery briefing schedule, and Intervenor the AGC may file a discovery brief. The court also stated that if there is limited discovery, the AGC may participate in depositions and file a motion for discovery. If the parties agree to limited discovery, then that discovery deadline is October 30, 2020.

CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege this case arises from Defendant's MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs allege the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C. Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

At the time of this report, the court has issued a Memorandum and Order, dated July 27, 2020, which provides the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August 2020 and reply briefs are due in September 2020. Plaintiffs and Defendants filed their Motions for Summary Judgment on August 5, 2020. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al., U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the U.S. Dep't of Agriculture (USDA), U.S. SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes, and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants have filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction, which is pending. The parties are to complete filing briefs by September 2020. Plaintiff has filed written discovery, which is pending, as defendants have filed a motion to stay discovery pending the outcome of the Motion to Dismiss.

Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the strict scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed.

Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C) and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to

try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), 15 percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

Upon review of all factors together, the court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry's policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the nonminority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH's policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys' fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous "negotiations" with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs, related legislation, state and local government implementation of the Federal DBE Program, and other types of programs impacting participation of MBE/WBE/DBEs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of MBE/WBE/DBE, or race-, ethnicity- or gender-neutral programs, the Federal DBE Program, and the implementation of the Federal DBE Program by state and local governments and recipients of federal funds. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

D. Recent Decisions Involving State and Local Government MBE/WBE/DBE Programs and Implementation by State and Local Governments of the Federal DBE Programs in the Tenth Circuit Court of Appeals

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

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

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

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

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

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

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

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

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

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

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

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

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

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

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

were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

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

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

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

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

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

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

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

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

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

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

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

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

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver’s evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

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

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

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area.” *Id.*, quoting *Concrete*

Works II, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

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

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

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

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

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

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected

the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

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

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

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

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

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

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

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

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

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and

that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver’s argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver’s expert testified that discrimination by banks or bonding companies would reduce a firm’s revenue and the number of employees it could hire. *Id.*

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

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver’s disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City’s position that a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

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

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

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

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

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

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

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

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

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

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

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

Summary. The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC hypothesized that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver’s program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court’s conclusion with respect to the second prong of *Crosby’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.

2. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

3. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10th Cir. 1994)

The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works") appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs")¹ and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid-1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the

record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, 0.7 percent and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was 0.05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver’s Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW “Major Bond Projects Final Report,” which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver's contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver's program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted Croson impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion or request for a preliminary injunction. *Id.* at 1527 *citing*, *Contractors Ass’n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the “percentage of [MBE] availability or composition in the ‘population’ of Philadelphia area construction firms”); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented “detailed findings of prior discrimination”); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between “the total percentage of minorities involved in construction and the work going to minorities” shows that “the racial classification in the County plan [was] necessary”).

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver’s data and questioned whether Denver’s reliance on the percentage of MBEs and WBEs available in the marketplace overstated “the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms.” *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm’s precise “capacity” at a given moment in time belied quantification due to the industry’s highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, “although almost all firms contacted indicated that they were interested in City work.” *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver’s data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver’s expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market — i.e. combined public and private sector utilization of MBEs and WBEs— the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carries more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Crosson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and

WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard — i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination — the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

4. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation (“DOT”) from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

5. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, nonminority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of nonminority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were nonminority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing

minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, *citing to Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or

indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id.* The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 citing *Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.*

The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act's bid preference provisions prevented nonminority businesses

from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution’s Fifth Amendment guarantee of equal protection and granted the plaintiffs’ Motion for Summary Judgment.

E. Recent Decisions Involving State and Local Government MBE/WBE/DBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

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

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

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

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

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

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

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

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

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

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

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However,

the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, citing *Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, citing *Alexander*, 95 F.3d at 315 (citing *Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.*, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id.* at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id.* at 242, quoting *Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.’ 615 F.3d 233 at 242 quoting *Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics — with a particular focus on owner race and gender — on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data — reflecting the number of subcontractors that actually bid on Department subcontracts — estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors — nearly 38 percent — “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more nonminority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

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

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

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

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

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

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

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

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

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

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

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

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

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

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

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

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

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

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties’ dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that “§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate.”

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down an MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

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

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

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

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

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

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

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

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of an MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, citing *Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under

Drabik, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

6. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action . . .” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

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 concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which nonminority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated, “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. *Id.* at 736. “If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct ...” *Id.* at 737, quoting *Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting” *Id.* at 737, quoting *Croson*, 488 U.S. at 507. The Court stated a narrowly tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10 percent of state contracts, while African Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state’s existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court’s hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was “not reconcilable” with the Ohio Supreme Court’s decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

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

A nonminority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15 percent because it was found that 10 percent of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20 percent of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African American- and Asian American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10–15 percent. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15 percent MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5 percent WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1 percent. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15 percent minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15 percent DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15 percent of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City’s contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City’s argument that the DBE classification created a preference based on “disadvantage,” not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the “relevant statistical pool,” of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* at 218, n.11. The sufficiency of a municipality’s findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study’s findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City’s Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City’s construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City’s construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City’s 15 percent DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott’s low bid because Scott failed to meet the Special Notice’s DBE-participation goal, not because Scott’s bid exceeded the City’s budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

9. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of an MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

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

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

The defendants also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas . . . [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the

statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (e.g., advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (e.g., inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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

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

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve. *Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.” *Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of

minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement Construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.” *Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’” *Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. Id.

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. Id.

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. Id. The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

*Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. *Id.* at 924-25.*

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. *Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

*[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. *Id.*, quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and*

respond to instances of discrimination if and when they have occurred in the County's own contracting process." *Id.*

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

11. Contractor's Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court's judgment declaring that the City's DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City's Ordinance sought to increase the participation of "disadvantaged business enterprises" (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 percent owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis — i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis — i.e., any firm may bid — with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the 2 percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 15 percent goal was appropriate. The

City maintained that the goal of 15 percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the 15 percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, nonminority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the “strong basis in evidence” for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have “passively participated” in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City’s theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O’Connor observed in *Crosson*: if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry — the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434. *Id.* at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Crosson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert’s conclusions because it found his reliance on Mr. Macklin’s work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin’s opinions. *Id.*

On the other hand, the district court credited “the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied.” *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not “identified even a single black contractor who was eligible for membership in any of the plaintiffs’ associations, who applied for membership, and was denied.” *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114-figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors “willing” to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be “willing” to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent

that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of black firms in federally assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15 percent set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that nonminority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court’s findings that the Council’s attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination — to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 percent participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council’s sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7 percent of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to nonminority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond’s efforts to remedy past discrimination. *Id.*

The district court found that the City’s procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City’s prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to nonminority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

12. *Contractor's Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17–500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17–503. “Disadvantaged business Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types — vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors’ equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not “narrowly tailored” to a “compelling government interest.” *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, [735 F.Supp. at 1295–98](#). The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298–99](#). The court held the Ordinance’s preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, [735 F.Supp. at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Crosom* and intermediate scrutiny to the gender preference under [Mississippi University for Women v. Hogan, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, [Hogan 458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, [Coral Constr. Co. v. King County, 941 F.2d 910, 930 \(9th Cir.1991\)](#), *cert. denied*, [502 U.S. 1033 \(1992\)](#); [Michigan Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583, 595 \(6th Cir.1987\)](#), *aff’d mem.*,

[489 U.S. 1061\(1989\)](#); [Associated General Contractors of Cal. v. City and County of San Francisco](#), 813 F.2d 922, 942 (9th Cir.1987); [Main Line Paving Co. v. Board of Educ.](#), 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [Cone Corp. v. Hillsborough County](#), 908 F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, citing [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, citing [Cleburne](#), 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, quoting, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1002, quoting, [488 U.S. at 492](#).

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, citing [488 U.S. at 502](#).

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, quoting, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, quoting, [1295–98](#).

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. [735 F.Supp. at 1295](#). The Court said this reading overlooked the statement in *Croson* that a City can be a “passive participant” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, quoting, [488 U.S. at 492](#).

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, quoting, [488 U.S. at 480](#).

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, quoting, [735 F.Supp. at 1296](#).

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, [Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919](#), the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson* — the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component — the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [Cone Corp., 908 F.2d at 916 \(10.78 disparity index\)](#); [AGC of California, 950 F.2d at 1414 \(22.4 disparity index\)](#); [Concrete Works, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [Stuart, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [O’Donnell, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed ... demonstrating that the disparities shown by the statistics are not significant or actionable ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics and Asian Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, six firms owned by Asian American persons, three firms owned by persons of Pacific Islands descent, and one other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian American, Pacific-Islander, and “other” minorities represented 0.12 percent of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms — the percentage of all of these groups combined — received no contracts does not rise to the “significant statistical disparity.” *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, *quoting*, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian American or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance — the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses — those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s 15 percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507](#).

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.* at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the 10 percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Crosson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

13. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, 950 F.2d 1401 (9th Cir. 1991)

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available nonminority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available nonminority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion

of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

14. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or

practice of discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Crosby*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's

business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

15. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016).

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston’s construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman’s expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston’s motion to exclude Kossman’s expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman’s proposed expert properly excluded. The district court first rejected Kossman’s objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court’s affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman’s proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman’s proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman’s argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston’s consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than 4 percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge’s observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge’s conclusion that the MWBE program is nearly tailored.

Native American-owned businesses. The study found that Native American-owned businesses were utilized at a higher rate in Houston’s construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston’s construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge’s recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native American-owned business. *Id.* The court found there was limited significance to the Houston consultant’s opinion that utilization of Native American-owned businesses would drop to statistically significant levels if two Native American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a “hypothetical non-existence” of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge’s recommendation with respect to excluding the utilization goal for Native American-owned businesses. *Id.* The court noted that a preference for Native American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native American-owned businesses in Houston’s construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston’s motion to exclude the Kossman’s proposed expert witness is granted; Kossman’s motion for summary judgment is granted with respect to excluding the utilization goal for Native American-owned businesses and denied in all other respects; Houston’s motion for summary judgment is denied with respect to including the utilization goal for Native American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman’s proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter “MJ”) granted Houston’s motion to exclude testimony of Kossman’s proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation (“M&R”) by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect

availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or nonminority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on nonminority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

16. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* (“*Rowe*”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT’s MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally, the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as an MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

17. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (“VOP”) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual benchmarks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various “good faith” requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-

certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff’s claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

18. *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.

19. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994." *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics and women, and concluded both times that the "County has reached parity for black, Hispanic and Women-owned firms in the areas of [A&E] services." The final report further stated, "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id.* at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE]

programs as applied to architects and engineers then there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by info USA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the

architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional. “ *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

20. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting an MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all

solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

21. *The Builders Ass’n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

22. *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.

23. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

24. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *a’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 (11th Cir. 1997), held that “[e]xplicit racial preferences may not be used except as a ‘last resort.’” *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a “strong basis in evidence” for strict scrutiny, and “sufficient probative evidence” for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods “to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data.” *Id.*, *citing Eng’g Contractors Ass’n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period. *Id.* The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

25. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. See *F. Buddie Contracting, Ltd. v. Cuyaboga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendants appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyaboga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

1. Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.
2. A program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id.*
3. The state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.
4. The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7%) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*
5. The state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*
6. The evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to "race-based quotas." *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise "dooms Ohio's program of race-based quotas." *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on nonminority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by nonminority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded nonminority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

26. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a nonminority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office of Minority & Women’s Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019)

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

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

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations' requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims against Acting Director of the USDOT's Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color or state law" as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor's claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a "program or activity" within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well founded reason" to question Taylor's membership claims, and that Taylor did not qualify as a "socially and economically disadvantaged individual." Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian-Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian-Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court’s threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court’s denial of the State’s motion to strike an expert report submitted in support of Mountain West’s motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West’s appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court’s determination that Mountain West has a private right to enforce Title VI, affirmed the district court’s decision to consider the disputed expert report by Mountain West’s expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West’s claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West’s Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West’s claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court’s order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West’s claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible “only if they are narrowly tailored measures that further compelling governmental interests.” *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. *Mountain West*’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. *Mountain West* argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. *Mountain West* argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than 10 percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting, *Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West’s case, it concluded that the record provides an inadequate basis for summary judgment in Montana’s favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of the parties (March 14, 2018).

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

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT’s implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway’s program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 *citing Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 *quoting United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “*only* on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to

award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to *Midwest Fence*, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that *Midwest Fence* describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. *Midwest Fence* also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that *Midwest Fence*’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, *Midwest Fence* contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, *Midwest Fence* attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out *Midwest Fence* did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore, the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant, and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered “solid evidence of systematic under-utilization calling for affirmative action to correct it.” *Id.* at *13. The study found that DBEs made up 25.55 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below \$500,000 and 8.25 percent of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts’ value that DBEs received dropped dramatically, to just 1.5 percent of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84 percent.

Tollway program. Tollway also relied on a disparity study limited to the Tollway’s contracting market area. The study used a “custom census” process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway’s historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In addition, the

Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence’s expert’s “speculation” that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence’s argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence’s attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants’ statistical analyses. *Id.* at *15.

In connection with Midwest Fence’s argument relating to the Tollway defendant, Midwest Fence argued that the Tollway’s supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway’s data were not exact. *Id.* The court said that while every single number in the Tollway’s “arsenal of evidence” may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence’s “abstract criticisms” do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT’s and the Tollway’s implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants’ strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence’s arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination," according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

4. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 2015 WL 4934560 at *1. It's average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at *2. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at *3. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at *3. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at *3-1. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at *5. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at *5. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at *9, *17. Dunnet Bay did meet the 22.77 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at *9. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at *31. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *10. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at *10. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. IDOT's DBE Program is not a "set aside program," in which nonminority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and nonminority contractors, can bid on all contracts. *Id.*

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at *13. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at *14. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 28.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at *15. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.*

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at *16. The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causal or redressability. *Id.* at *17. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.* at *17.

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a nonminority-owned small business. *Id.* at *17-18.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at *18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *19, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at *20. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at *20. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 20.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at *20. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.*

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at *21. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 21-22.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at *22. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2016. The Petition was denied by the Supreme Court.

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race- and sex-based preferences to African American, Native American-, Asian-Pacific American- and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district

court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." Id. 1191, citing Western States Paving Co., 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm

could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific American and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans’ DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American- and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans’ DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT

granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an ‘exceedingly persuasive justification’ and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans’ DBE program contains both race- and gender-conscious measures, and that the “entire program passes strict scrutiny.” *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC’s as-applied challenge to Caltrans’ DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be “limited to those minority groups that have actually suffered discrimination.” *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997–99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a “significant statistical disparity” could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring “the cold numbers convincingly to life.” *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT’s DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer — or have ever suffered — discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans’ decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state’s contracting industry. *Id.* at 1198. The Court found Caltrans’ DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American- and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American and women-owned firms. *Id.* The Court held that Caltrans’ program “adheres precisely to the narrow tailoring requirements of *Western States*.” *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.” *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans’ program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans’ program, narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.” *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC’s claim that Caltrans’ program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans’ program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally funded contracts. The Court also rejected AGC’s challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans’ DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

6. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182.* All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182.*

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein’s ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff’s showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation’s (“IDOT”) DBE Program. Plaintiff Northern Contracting Inc. (“NCI”) was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet’s Marketplace data. *Id.* This initial list was corrected for errors

in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes clearer now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427

(D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had

been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and *Gross Seed* both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, *Sherbrooke* and *Gross Seed* argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side’s position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state’s implementation becomes relevant to a reviewing court’s strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal “must be based on demonstrable evidence” as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state’s determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and *Gross Seed* also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number,

0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like *Sherbrooke*, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*).

Recent District Court Decisions

10. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn 2017)

In a recent criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white-collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors (“CSE”) and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC’s principal was paid a relatively nominal “fixed-fee” for permitting use of WMCC’s name on each of these subcontracts. *Id.* at 744.

Defendant’s contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the “defraud clause” of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of “commercially useful function” set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States’ Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally funded subcontracts totaling approximately \$2.34 million under PennDOT’s and PTC’s DBE program and WMCC was paid a total of \$1.89 million.” *Id.* at 746. These subcontracts were between WMCC and a general contractor and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT’s program, the entire amount of WMCC’s subcontract with the general contractor,

including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746.

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss — challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see* [Midwest Fence Corp. v. United States Dep't of Transp.](#), 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, *citing*, [49 C.F.R. §§ 26.55\(c\)\(1\)–\(2\)](#). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence

describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, citing, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in [Maxwell](#), the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); [23 U.S.C. § 304](#) (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); [23 U.S.C. § 315](#) ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp.](#), 840 F.3d at 942 (citing [Western States Paving Co. v. Washington State Dep't of Transportation](#), 407 F.3d 983, 993 (9th Cir. 2005); [Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation](#), 345 F.3d 964, 973 (8th Cir. 2003); [Adarand Constructors, Inc. v. Slater](#), 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

11. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017)

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as an MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49

C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE’s representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys’ fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs’ remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs’ Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments’ due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at *14, *citing*, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs’ claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at *14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at *14, quoting, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, citing, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criterion based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs’ void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs’ claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations’ requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, citing, *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at *17, quoting, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs’ Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants’ Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants’ Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the

State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

12. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).

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

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

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

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

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

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

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

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

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

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

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at *11. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources

across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id. at *11.*

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

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep’t. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id. at *12, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id. at *12.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at *19. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* at *19. The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

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

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

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

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

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

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at *20. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

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

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

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* at *21. The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is

elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at *21.

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

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

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

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

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

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

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

13. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), affirmed *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely “on the federal government’s compelling interest in remedying the effects of past discrimination in the national construction market.” *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is “insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

14. *Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)*

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT’s implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT’s implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race-based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination," while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government’s evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and nonminority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate

on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals," but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored.

Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrooke Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of

Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the

government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

15. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical marketplace for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchase awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it

susceptible to an as-applied constitutional challenge.” *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, citing 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, citing *Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian-Pacific Americans and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held “that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” Slip Opinion Transcript at 52.

The court rejected the plaintiff’s arguments that anecdotal evidence failed to identify specific acts of discrimination, finding “there are numerous instances of specific discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

17. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only 81% DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana

Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, “the Ninth Circuit held that California’s DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California — and, by extension, Montana — “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

18. *Geod Corporation v. New Jersey Transit Corporation, et. seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT’s DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT’s DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT’s DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT’s disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT’s statistical evidence did not

establish discrimination; NJT did not have anecdotal data evidencing a “strong basis in evidence” of discrimination which justified a race- and sex-based program; NJT’s program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT’s program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments’ compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff’s argument that NJT cannot establish the need for its DBE program was a “red herring, which is unsupported.” The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states “inherit the federal governments’ compelling interest in establishing a DBE program.” *Id.*

The court found that establishing a DBE program “is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so.” *Id.* The court concluded that this reasoning rendered plaintiff’s assertions that NJT’s disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender-based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff’s and defendant’s arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation’s requirements. The district court stated that the requirement that a recipient must evidence past discrimination “is nothing more than a requirement of the regulation.” *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT

assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender-neutral means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

19. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored, and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

20. *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's

DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, citing *Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed

out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that “where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations.” 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that “the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.” 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is “simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations.” *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

21. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity- and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the “plaintiff”), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations (“TEA-21”), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the “maximum feasible portion” of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder’s list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet’s *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned

businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE

utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id.* at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.' *Id.* at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "plausible lower-bound estimate" of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII,”* 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

22. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require “serious, good faith consideration of workable race-neutral alternatives.” 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest.

The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

23. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.). The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

24. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), *aff'd* 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact MBE/WBE/DBE Programs

1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), *cert. denied*, 2017 WL 1375832 (Oct. 16, 2017), *affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration’s 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id**1. Businesses owned by “socially and economically disadvantaged” individuals are eligible to participate in the 8(a) program. *Id*. The statute defines socially disadvantaged individuals as persons “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe’s allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id**1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id*. The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id*.

In contrast to the *statute*, the court found that the SBA’s *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id**2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id*. Rothe’s definition of the racial classification it attacks in this case, according to the court, does not include the SBA’s regulation. *Id*.

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id**2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id**2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id**2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id**3. On its face, the court stated the term envisions an individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “socially disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id**3.

The court distinguished cases involving situations in which disadvantaged nonminority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id**3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id**4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id**4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id**5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id**6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id**8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id**10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id**9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id**10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id**10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances

qualifies as compelling. *Id**11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id**11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id**11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id**11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id**12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id**13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id**16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id**22.

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

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by

non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female.

Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as an SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator

Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at

875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest — strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark

Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 citing to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545

F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was no evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, citing *Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, quoting *Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, quoting *W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015), affirmed on other grounds, 2016 WL 471909 (D.C. Cir. September 9, 2016).

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe’s motion to exclude Defendants’ expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in *Rothe* agrees with the court’s reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff’s motion for summary judgment and grants Defendants’ cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government’s compelling interest or that demonstrated that the government’s evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants’ expert evidence. One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small nonminority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action — specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court’s conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe’s argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual’s status as socially or economically disadvantaged. *Id.* The court said that Rothe’s argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the “narrowness” of the narrow-tailoring mandate relates to the relationship between the government’s interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See 836 F.3d. 57, 2016 WL 4719049 (D.C. Cir. September 9, 2016).

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also

claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian-Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic*’s argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and nonminority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and nonminority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to

formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also, in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and nonminority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence

of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O’Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a nonminority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on 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 nonminority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and *DynaLantic*: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD’s utilization of the Small Business Administration’s (“SBA”) 8(a) Business Development Program (“8(a) Program”). In its Order of August 23, 2007, the district court denied both parties’ Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff’s action for lack of standing but granted the plaintiff’s motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement, but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff’s inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff’s injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff’s complaint could be read only as a challenge to the DOD’s implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government’s proffered “compelling government interest,” the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rotbe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Collection of State Contract Data

Keen Independent compiled data about State procurements including some subcontracts. The data pertain to construction, construction-related professional services, brokerage and investment services, other professional services, goods and other services procurements during the July 1, 2014 through June 30, 2018 study period. Appendix C describes the study team’s utilization data collection processes in five parts:

- A. Procurement data;
- B. Subcontract data;
- C. Characteristics of utilized firms;
- D. State of Colorado review; and
- E. Data limitations.

A. Procurement Data

Keen Independent collected State procurement data from three sources:

- Department of Personnel & Administration (DPA);
- Colorado Community Colleges System (CCCS); and
- Colorado Department of Transportation (CDOT).

Data received. DPA provided data for nearly all departments of State government. Because CCCS and CDOT use different purchasing information systems, they separately supplied their procurement data.

Department of Personnel & Administration. DPA provided procurement information for Colorado executive agencies participating in the 2020 Disparity Study.¹ DPA provided the following databases:

- Procurement awards (68,932 procurements totaling \$8.4 billion);
- Commodity codes;
- Accounting codes; and
- Vendor data.

¹ Department of Agriculture, Department of Corrections, Department of Education, Department of Human Services, Department of Law, Department of Local Affairs, Department of Military Affairs, Department of Public Health and Environment, Department of Public Safety, Department of Revenue, Department of State, Department of Health Care Policy and Finance, Department of Labor and Employment, Department of Natural Resources, Department of Higher Education, Department of Regulatory Agencies, Department of Treasury, Department of Personnel & Administration, and Office of the Governor.

The Keen Independent study team merged these databases to create a consolidated database. Each record represented one procurement. Fields included in the consolidated database include:

- Unique identifier (combination of award document code, department code, award number);
- Vendor code;
- Vendor name;
- Voucher line number;
- Award document department code,
- Award document number;
- Award document name;
- Award header record date;
- Award document extended description;
- Award amount;
- Award commodity code and description;
- Object code and description;
- Vendor type;
- Vendor classification;
- Appropriation code and description; and
- Vendor address (street address, state, city and zip code).

Colorado Community College System. The CCCS central office provided procurement information for its 13 community colleges and central office.² After identifying and removing duplicate purchase orders, Keen Independent combined purchase order and vendor records to create a consolidated database that included 3,313 procurements totaling \$227 million. Each record was a single purchase order. Fields included in the consolidated database include:

- Purchase order number;
- Transaction date;
- College name;
- Vendor ID;
- Vendor name;
- Total approved amount;
- Vendor address (street address, city, state, zip code);
- Account number and account description; and
- Commodity description.

² Arapahoe Community College, Colorado Northwestern Community College, Community College of Aurora, Community College of Denver, Front Range Community College, Lamar Community College, Morgan Community College, Northeastern Junior College, Otero Junior College, Pikes Peak Community College, Pueblo Community College, Red Rocks Community College and Trinidad State Junior College.

Colorado Department of Transportation. CDOT provided a procurement and a vendor database. Keen Independent combined them to create a consolidated database with procurements and corresponding vendors. There were 42,624 procurements summing to \$6.9 billion in the CDOT data.

Each purchase order or contract was one record in the data. Fields included in the consolidated database include:

- Purchase document;
- Vendor name;
- Purchase order type;
- Material group description;
- Short description;
- Entity type;
- Region;
- Total purchase order amount;
- Document date;
- Funding source; and
- Vendor address (street address, city, state and zip code).

Keen Independent combined DPA, CCCS and CDOT data to create a master procurement database.

Exclusions. Some of the records in the DPA, CCCS and CDOT data were for types of purchases not appropriate for inclusion in this disparity study. Therefore, the study team excluded some records from further analysis.

- For example, the study only includes procurements above \$10,000 made within the July 2014 through June 2018 study period. Smaller purchases were excluded as they account for a very small portion of total procurement dollars.
- Federally funded contracts were not included in the study as federal agencies often restrict how the State makes those purchases.
- Because disparity studies examine utilization of businesses in an agency's contracts, purchases from government agencies and other non-businesses were excluded.

Department of Personnel & Administration. Keen Independent excluded from the DPA consolidated database:

- Procurements below \$10,000;
- Vendors classified as state, local or other government, non-profit organizations, membership organizations, religious organizations and jurors;
- Federal contracts (identified using Appropriation codes);
- Procurements outside study period; and
- Certain object classifications (see Figure C-1).

These exclusions removed about 42,700 procurements for \$2.6 billion from the DPA data.

Figure C-1.

DPA object codes excluded from analysis

Object codes	Description	Object codes	Description
1350	Employee Non-Cash Incentive Awards	5140	Grants - Intergovernmental
2255	Rental of Buildings	5141	Grants - Intergovernmental - Federal Pass Thru
2256	Rental of Land	5150	Grants - Local District Colleges
2258	Parking Fees	5170	Grants - School Districts
2270	Rental of Water Rights	5180	Grants - Special Districts
2510	In-State Travel	5181	Grants - Special Districts - Federal Pass Thru
2512	In-State Personal Travel Per Diem	5420	Purchased Services - Counties
2520	In-State Travel/Non-Employee	5430	Purchased Services - Federal Government
2522	In-State/Non-Employee - Personal Per Diem	5440	Purchased Services - Intergovernmental
2531	Out-of-State Common Carrier Fares	5450	Purchased Services - Local District Colleges
2560	Out-of-Country Travel/Non-Employee	5470	Purchased Services - School Districts
2670	Education Services From Higher Education Enterprises	5480	Purchased Services - Special Districts
3120	Books/Periodicals/Subscriptions	5520	Distributions - Counties
3123	Postage	5530	Distributions - Local Dist Colleges
3910	Energy Charges - Other	5560	Distributions - Special Districts
3940	Electricity	5570	Distributions - Intergovernmental Entities
4111	Prizes and Awards	5770	Pass-Thru Federal Grants - State Departments Intrafund
4113	Actual Damages - Property	5771	Pass-Thru Federal Grants - State Departments Interfund
4117	Reportable Claims Against The State	5775	State Grant/Contract Intrafund
4140	Dues and Memberships	5781	Grants To Nongovernmental Organizations
4160	Lottery Prizes	5791	Grants To Individuals
4170	Miscellaneous Fees And Fines	5880	Distributions to Nongovernmental Organizations
4180	Official Functions	5881	Distributions to Nongovernmental Orgns - Fed Pass Thru
4181	Customer Workshops	5882	CO Water Conservation Board Loans To Nongovernments
4190	Patient and Client Care Expenses	5891	Distributions To Individuals
4192	Care and Subsistence - Other Vendor Services	5892	Student Financial Aid
4193	Care and Subsistence - Client Benefits	5894	Nontaxable Payments To Individuals
4195	Care and Subsistence - Rent To Owners	6110	Buildings - Direct Purchase
4220	Registration Fees	6120	Land - Direct Purchase
4256	Other Benefit Plan Expense	6130	Land Improvements - Direct Purchase
4910	Cost of Goods Sold	6140	Leasehold Improvements - Direct Purchase
5110	Grants - Cities	6180	Other Real Property - Direct Purchase
5120	Grants - Counties	6310	Buildings - Lease Purchase
5121	Grants - Counties - Federal Pass Thru	700E	Operating Transfers to Governor's Office

Colorado Community College System. CCCS made many of the necessary exclusions prior to providing Keen Independent its procurement data. The study team further excluded:

- Federal contracts (identified through the Organization field); and
- Certain Account codes (see Figure C-2).

These exclusions removed 700 procurements worth \$42 million.

Figure C-2.
CCCS account codes excluded from analysis

Account codes	Description	Account codes	Description
117020	Inventory Course Books	721168	Library Periodical Non Capital
117080	Inventory Supplies for Resale	721265	PSEO Spring Instr Svc Non-1099
226010	Deposits Held In Custody Current	721266	PSEO Fall Instr Svc Non-1099
710060	COGS Course Books	721345	Web Based Services
710120	COGS General Books	721470	General Insurance
720320	PCard Clearing	721510	Insurance Other (Non Emp)
720390	Water and Sewer	721520	Royalties
720520	Communication Svcs State Telecom	721530	License Fees
720540	Communication Services Non State	721650	Natural Gas
720550	Cell Phone Services	721680	Electricity
720560	Long Distance Charges	740030	In State Program Travel
720640	Refund to Other State Agency	740060	In State Non-Mileage Travel Non Emp
720750	Conference and Registration Fees	740080	Out Of State Non-Mileage Travel Emp
720830	Memberships and Dues	740100	Out Of State Program Travel
720900	Non Capital Software	740110	Out Of State Non-Mile Trav Non Emp
720980	Settlements	760015	Library eBooks
720982	Software Maintenance/Hosting	760120	Direct Purchase Software
720984	Software License	760125	Direct Purchase Software License
721050	Prizes and Awards 1099	770020	Capital Lease Bldg
721070	Rental Of Buildings	775299	CC Art 1099able
721160	Books and Subscriptions Non Library	775300	Internally Developed Proj Software
721165	Library Media Non Capital	721490	Insurance Liability

Colorado Department of Transportation. Keen Independent excluded from the CDOT consolidated database:

- Procurements below \$10,000;
- Vendors classified as governments or non-profit organizations;
- Federal contracts; and
- Certain goods purchased from national markets (application software for large systems and microcomputer, business software and scanner software).

There were about 34,400 procurements for \$5.3 billion excluded from the CDOT data.

Additional exclusions. After consolidating the DPA, CCCS and CDOT databases, Keen Independent reviewed procurement records and made additional exclusions for the following types of vendors or types of goods or services:

- Government;
- Universities/colleges/schools (as vendors);
- Nonprofit organizations;
- Utilities (gas, electricity, telecommunications as they are regulated utilities);
- Non-custom computer software (e.g., Microsoft, Adobe);
- Rental of buildings;
- Radio/TV/newspapers/magazines;
- Hospitality (hotel, restaurants);
- Dues and memberships;
- Rental of copy machines;
- Purchase of books;
- Rental of land/real estate purchase;
- Purchases primarily made from markets served by nonprofits (further described below);
and
- Purchases that are primarily made from national markets (further described below).

Coding of work types for prime contracts. Keen Independent coded the type of work involved in each Colorado procurement using 70+ categories of types of work in construction, construction-related professional services, other professional services, brokerage and investment, goods and other services developed for the disparity study. (See Appendix D for a list of the work types and 8-digit codes for this study.)

Department of Personnel & Administration. DPA uses object codes and commodity codes to record the type of construction, services or goods provided in each procurement. Commodity codes are based on the National Institute of Governmental Purchasing (NIGP) system. Keen Independent translated those codes into 8-digit subindustry codes developed by Dun & Bradstreet, which are based on the Standard Industrial Classification (SIC) system. (Keen Independent refers to these 8-digit codes as SIC codes in the balance of this Appendix.)

Colorado Community College System. CCCS uses account codes to record type of construction, services or goods provided in each procurement. Keen Independent translated those codes into 8-digit SIC codes.

Colorado Department of Transportation. The CDOT database includes a material group description that describes type of construction, services or goods provided in each procurement. Keen Independent translated those material group descriptions into 8-digit SIC codes.

Further coding and review. Keen Independent individually researched the type of work performed in a procurement for each procurement when object, NIGP and account codes or material group descriptions were not sufficiently detailed to identify the type of work, goods or services provided. The study team then:

- Reviewed the coding of each of the procurements in the database;
- Reviewed addresses provided in the data;
- Identified additional government, not-for-profit and other organizations to be properly excluded from the disparity study;
- Determined types of purchases primarily made from markets in Colorado dominated by not-for-profit organizations (in Colorado, this was medical services); and
- Determined types of purchases primarily made from national markets (purchases for which a small portion went to firms with a physical presence in Colorado).

The overall exclusions totaled about 94,000 procurements and about \$12.3 billion.

Identification of location of place-specific procurements. Keen Independent coded place-specific procurements such as construction contracts into one of five regions, as described in Chapter 3. The study team used information in the procurement data to geographically code these projects.

B. Subcontract Data

Keen Independent collected subcontract information in different ways.

Colorado Department of Transportation. CDOT was able to provide Keen Independent subcontract information for some of its State-funded construction contracts and some architecture and engineering contracts. The subcontract data obtained from CDOT included:

- Contract number;
- Purchase order number;
- Subcontractor name;
- Subcontract amount;
- Subcontract description of work; and
- Subcontractor address (street address, city, state and zip code).

Other departments and individual colleges. Keen Independent contacted departments and individual colleges with large construction contracts (contracts more than \$500,000) to identify any subcontract information collected by those departments.

The following colleges and departments provided some information:

- Trinidad State Junior College;
- Red Rocks Community College;
- Northeastern Junior College;
- Department of Agriculture;
- Department of Higher Education;
- Department of Human Services;
- Department of Natural Resources; and
- Department of Public Health & Environment.

Prime contractors. In addition to this information, Keen Independent collected subcontract information directly from prime contractors for large construction and architecture and engineering contracts (contracts more than \$500,000). Keen Independent used email and phone to reach these prime contractors and Colorado Department of Transportation also emailed requests to CDOT vendors.

Subcontractors. Keen Independent also contacted subcontractors directly. As with prime contractors, Keen Independent used email and phone to reach these subcontractors.

Total subcontract data collected. Figure C-3 describes the portion of construction and construction-related contract dollars for which the study team was able to obtain complete subcontract data. Of the \$1.3 billion in total construction and construction-related contract dollars, the study team compiled complete subcontract information for about 24.4 percent of the value of those contracts. The amount of information received for construction subcontracts is a limitation for this study.

Figure C-3.

Summary of subcontract data for construction and construction-related professional services contracts collected for the study

	\$1,000s	Percent of dollars
Prime contract dollars with complete sub information	\$ 279,584	21.5 %
Prime contract dollars with reportedly no subs	36,481	2.8
Total prime contract dollars with some complete sub info	\$ 316,065	24.4 %
Prime contract dollars with sub names but no amounts	\$ 7,951	0.6 %
Prime contract dollars with partial sub names and amounts	155,428	12.0
Prime contract dollars with no information	1,134,054	87.4
Total prime contract dollars	\$ 1,297,433	100.0 %

Source: Keen Independent Research from State of Colorado procurement data, prime contractors and subcontractors.

C. Characteristics of Utilized Firms

Keen Independent examined firm location and attempted to collect other business characteristics including the race, ethnicity, gender, as well as disability status or LGBT identification of the business owner.

Firm location. The study team analyzed the location of firms receiving procurements based on vendor information in the vendor datasets provided by DPA, CCCS and CDOT.

Sometimes the provided datasets only had a headquarters or billing address and not the address for its Colorado location. Some of the firms receiving the most work from the State originally appeared to be non-local. Keen Independent further researched whether these businesses had a physical presence within Colorado, and if so, updated the location information for those firms.

Firm ownership. Data on the race, ethnicity, gender, disability status and LGBT identification ownership of utilized firms is key to building the database on firm characteristics. Sources of information to determine firm ownership include:

- Colorado Unified Certification Program DBE/ACDBE directory;
- City and County of Denver EBE/MWBE/SBE/SBEC directory;
- Regional Transportation District SBE directory;
- U.S. Department of Veteran Affairs Service-Disabled Veteran-Owned Small Business (SDVOSB) business directory (a source for disability status);
- Small Business Administration business directory;
- State of Colorado vendor tables;
- National LGBT Chamber of Commerce directory;
- Colorado Asian Chamber of Commerce directory;
- Colorado Black Chamber of Commerce directory;
- Colorado Women’s Chamber of Commerce directory;
- Hispanic Chamber of Commerce of Metro Denver directory;
- Rocky Mountain Indian Chamber of Commerce directory;
- Mountain Plains Minority Supplier Development Council directory;
- Colorado LGBTQ Chamber business directory;
- Keen Independent’s availability survey with firm owners and managers;
- Keen Independent’s separate utilization survey with firm owners and managers; and
- Information from Dun & Bradstreet.

Only firms certified as LGBT-owned are counted as LGBT-owned in this study. For each other group, Keen Independent coded a firm as owned by a group whether or not it was certified as such. The methodology for assigning ownership in the utilization is parallel to the approach in the availability analysis (see Chapter 5 and Appendix D).

D. State of Colorado Review

The study team met with State staff multiple times to review data collection, information the study team gathered, sample data for specific contracts and preliminary results. Keen Independent reviewed and incorporated the State's feedback throughout the study process.

E. Data Limitations

Limitations concerning procurement data collection include the following:

- Most departments other than CDOT do not track subcontract data and CDOT did not have complete subcontract information for all of its construction contracts. As a result, Keen Independent requested subcontract data for the largest construction contracts from prime contractors and subcontractors. Only a portion responded.
- Information provided in the State's procurement data sometimes did not clearly identify the type of construction, goods and services provided in a procurement. In some cases, coding is based on the primary line of business for the firm awarded the contract or subcontract. When the specific type of work could not be determined, the record was coded as "Other construction," "Other professional services," etc. Therefore, there is less-than-perfect coding of type of construction, good or service provided for some of the procurements in the final database.
- Some of the ways brokerage and investment firms earn money through agreements with the State do not appear in any procurement databases. For example, investment bankers that assist the State in issuing financial instruments receive their funds through sales of those bonds, not by direct payments from the State. Keen Independent separately obtained information on these transactions based on cost of issuance data provided by the Department of Treasury.
- There were some firms for which no ownership information was uncovered after researching the company. Keen Independent coded those firms as majority-owned businesses not owned by a person with a disability (and not LGBT-certified).

It does not appear that any of these data limitations would materially affect overall results of the disparity analyses.

APPENDIX D.

Availability Data Collection

The study team used an approach similar to a “custom census” to compile data on minority-, women-, disabled- and majority-owned firms¹ available for State contracts and developed dollar-weighted availability benchmarks for minority-, women-, disabled- and LGBT-certified firms for each study industry based on analysis of individual prime contracts and subcontracts. Appendix D further explains the availability data collection methodology in five parts:

- A. General approach to collecting availability information;
- B. Development of the survey instruments;
- C. Execution of availability surveys;
- D. Additional considerations related to measuring availability; and
- E. Availability survey instrument.

A. General Approach to Collecting Availability Information

Keen Independent collected information from firms about their availability for State contracts through telephone surveys as well as fax and fillable PDF surveys (sent to firms when requested and downloaded from the study website).

Listings. Keen Independent compiled the list of firms to be contacted in the availability surveys from several sources:

- Company representatives who had previously identified themselves to the State as interested in learning about future work by being prequalified for work or being on bidding lists (referred to here as “interested firms”).
- Businesses that Dun & Bradstreet (D&B) identified in certain subindustries related to State procurement that had locations in Colorado (D&B Hoovers’ business establishment database).

The availability analysis focused on companies in Colorado performing types of work most relevant to State construction, construction-related professional services, other professional services, goods and other services contracts (including subcontracts).² As such, Keen Independent did not include all of the businesses in the interested firms lists or D&B database in the final list of firms to be contacted in the availability survey, as described below.

¹ Keen Independent also collected data on LGBT-owned firms by determining which firms among the final list of available firms were certified as owned by LGBT individuals by the National LGBT Chamber of Commerce or the CO LGBTQ Chamber of Commerce, as described in Chapter 4.

² Keen Independent considered the availability of brokerage and investment firms separately (see Chapter 4).

Public entity interested firms lists and related sources of information. The State provided lists of businesses that identified themselves as interested in learning about State contract opportunities. The lists included:

- Colorado Supplier Self-Service Portal (SuSS) list — The Colorado Department of Transportation (CDOT) provided Keen Independent with a list of all firms with accounts in their SuSS system, where businesses can register to view and respond to goods and services solicitations or to prequalify with CDOT for professional services contracts.
- Colorado Vendor Self-Service (ColoradoVSS) list — Firms interested in doing business with most State agencies and community colleges can register through the VSS website to review solicitation requests, receive solicitation notices based on self-selected commodity codes and respond to solicitations for construction, goods and services. The Department of Personnel & Administration supplied this list to Keen Independent.

After combining the lists, Keen Independent attempted to exclude any listings for government agencies or not-for-profit organizations as well as any firms lacking a location within Colorado. (Not all such establishments were successfully excluded from the initial list, so Keen Independent further screened for out-of-area businesses and government or not-for-profit businesses after completion of the availability survey.)

Dun & Bradstreet database. There might be other firms available for State work that do not appear on State agency lists. Therefore, Keen Independent supplemented the firms on the above lists by acquiring D&B data for firms in Colorado doing business in relevant subindustries.

D&B Hoovers maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to supplement the companies identified in the State’s databases of bidders, vendors and prequalified firms.

Keen Independent determined the types of work involved in Colorado contracts 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.³ Figure D-1 (see page 4 below) identifies the work specialization codes the study team determined were the most related to State contract dollars.

Keen Independent obtained a list of firms from the D&B Hoovers database within relevant work codes that had locations within Colorado. D&B provided phone numbers for these businesses.

Total listings. Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, the data sources provided 48,880 unique business listings for the availability surveys.

³ 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 did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a “custom census,” as discussed in Appendix B.

Telephone surveys. Study team member Customer Research International (CRI) conducted telephone surveys with listed businesses. After receiving the list described above, CRI used the following process to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the State of Colorado to firms providing goods and services related to State agency contracts.
- Interviews began in April of 2020 and CRI completed the survey effort in June.

Other avenues to complete a survey. If a company was not able to complete a survey on the telephone, business owners could request a fax or fillable PDF version of the survey. Additionally, the study team posted PDFs of the survey on the disparity study website, and any business owner could respond to the survey, regardless of whether they were on the initial business list.

The State also sent emails to vendors encouraging them to visit the disparity study website and participate in the study.

Figure D-1.
D&B 8-digit codes for D&B survey availability list source

Construction	
Asphalt, concrete or other paving	
16110200	Surfacing and paving
16110202	Concrete construction: roads, highways, sidewalks,
16110203	Grading
16110204	Highway and street paving contractor
16110205	Resurfacing contractor
16110206	Sidewalk construction
17710200	Curb and sidewalk contractors
17710201	Curb construction
17710202	Sidewalk contractor
17710300	Driveway, parking lot, and blacktop contractors
17710301	Blacktop (asphalt) work
17710302	Driveway contractor
17710303	Parking lot construction
Concrete work	
17710000	Concrete work
17710100	Stucco, gunite, and grouting contractors
17710101	Exterior concrete stucco contractor
17710102	Grouting work
17710103	Gunite contractor
17719901	Concrete pumping
17719902	Concrete repair
17719903	Flooring contractor
17719905	Patio construction, concrete
17919902	Concrete reinforcement, placing of
17919907	Precast concrete structural framing or panels, placing
Electrical work	
17310000	Electrical work
17310100	Electric power systems contractors
17310101	Cogeneration specialization
17310102	Computer power conditioning
17310103	Standby or emergency power specialization
17310104	Switchgear and related devices installation
17310200	Electronic controls installation
17310201	Computerized controls installation
17310202	Energy management controls
17310203	Environmental system control installation
17310300	Communications specialization
17310301	Cable television installation
17310302	Fiber optic cable installation
17310303	Sound equipment specialization
17310304	Telephone and telephone equipment installation
17310305	Voice, data, and video wiring contractor
17310400	Safety and security specialization
17310401	Access control systems specialization
17310402	Closed circuit television installation
17310403	Fire detection and burglar alarm systems specialist
17319902	Computer installation
17319903	General electrical contractor
17319904	Lighting contractor
Highway, street and bridge construction	
16110000	Highway and street construction
16110207	Gravel or dirt road construction
16119901	General contractor, highway and street construction
16119902	Highway and street maintenance
16119903	Highway reflector installation
16220000	Bridge, tunnel and elevated highway construction
16229901	Bridge construction
16229902	Highway construction, elevated
16229903	Tunnel construction
16229904	Viaduct construction
17210303	Pavement marking contractor
Excavation, site prep, grading and drainage	
16290000	Heavy construction, nec
16290105	Drainage system construction
16290106	Dredging contractor
16290108	Irrigation system construction
16290109	Levee construction
16290112	Pond construction
16290113	Waterway construction
16290400	Land preparation construction
16290401	Land leveling
16290402	Land reclamation
16290403	Rock removal
16290404	Timber removal
16299901	Blasting contractor, except building demolition
16299902	Earthmoving contractor
16299903	Land clearing contractor
16299904	Pile driving contractor
16299906	Trenching contractor
17940000	Excavation work
17949901	Excavation and grading, building construction
17950000	Wrecking and demolition work
17990503	Construction site cleanup
17990900	Building site preparation
17959901	Concrete breaking for streets and highways
17959902	Demolition, buildings and other structures
Drilling and foundations	
17410100	Foundation and retaining wall construction
17719904	Foundation and footing contractor
17990901	Boring for building construction
17999906	Core drilling and cutting
17999908	Diamond drilling and sawing
Plumbing, heating and air conditioning	
17110000	Plumbing, heating, air-conditioning
17110100	Boiler and furnace contractors
17110101	Boiler maintenance contractor
17110102	Boiler setting contractor
17110103	Heating systems repair and maintenance
17110104	Hydronics heating contractor
17110200	Plumbing contractors
17110201	Septic system construction
17110300	Sprinkler contractors
17110301	Fire sprinkler system installation
17110302	Irrigation sprinkler system installation
17110400	Heating and air conditioning contractors
17110401	Mechanical contractor
17110402	Process piping contractor
17110403	Solar energy contractor
17110404	Ventilation and duct work contractor
17110405	Warm air heating and air conditioning
17119901	Refrigeration contractor
Roofing	
17610000	Roofing, siding, and sheetmetal work
17610100	Roofing and gutter work
17610101	Gutter and downspout contractor
17610102	Roof repair
17610103	Roofing contractor
17610104	Skylight installation
17619901	Architectural sheet metal work
17619902	Ceilings, metal: erection and repair
17619903	Sheet metal work, nec
17619904	Siding contractor
17619905	Chute installation (linen, mail, trash, etc.)
Heavy construction equipment (see Goods)	
Construction materials and supplies (see Goods)	
Landscape maintenance (see Other services)	

Figure D-1 (continued).
D&B 8-digit codes for D&B survey list source

Construction (continued)		Construction-related professional services	
Installation of guardrails, fencing and signs		Architecture and engineering	
16110100	Highway signs and guardrails	73890200	Inspection and testing services
16110102	Highway and street sign installation	73890203	Building inspection services
17999912	Fence construction	87110000	Engineering services
17999929	Sign installation and maintenance	87110100	Sanitary engineers
		87110101	Pollution control engineering
		87110400	Construction and civil engineering
		87110401	Building construction consultant
		87110402	Civil engineering
		87110403	Heating and ventilation engineering
		87110404	Structural engineering
		87119901	Acoustical engineering
		87119903	Consulting engineer
		87119905	Electrical or electronic engineering
		87119907	Fire protection engineering
		87120000	Architectural services
		87120100	Architectural engineering
		87120101	Architectural engineering
		87340000	Testing laboratories
		87340103	Welded joint radiographing
		87349909	Soil analysis
		89990701	Geological consultant
		89990702	Geophysical consultant
Office and public building construction		Surveying and mapping	
15410000	Industrial buildings and warehouses	73890800	Mapmaking services
15419905	Industrial buildings, new construction, nec	73890801	Mapmaking or drafting, including aerial
15419908	Prefabricated building erection, industrial	73890802	Photogrammetric mapping
15419909	Renovation, remodeling and repairs: industrial building	87130000	Surveying services
15419910	Steel building construction	87139901	Photogrammetric engineering
15420000	Nonresidential construction, nec	87139902	Surveying technicians
15420100	Commercial and office building contractors		
15420101	Commercial and office building, new construction	Construction management	
15420102	Commercial and office buildings, prefabricated erection	87419902	Construction management
15420103	Commercial and office buildings, renovation and re	87420402	Construction project management consultant
15420403	Hospital construction	Environmental consulting	
15429901	Custom builders, non-residential	87310302	Environmental research
15429902	Design and construction combined, non-residential	87489905	Environmental consultant
15429903	Institutional building construction	Real estate consulting and appraisal services	
15429905	Stadium construction	65319901	Appraiser, real estate
		87420406	Real estate consultant
Landscape contracting		Transportation planning	
7820207	Sodding contractor	87420410	Transportation consultant
7820210	Turf installation services, except artificial	87480204	Traffic consultant
7829903	Landscape contractors		
7830101	Planting services, ornamental bush		
7830102	Planting services, ornamental tree		
School building construction			
15420406	School building construction		
15220104	Dormitory construction		
16290300	Athletic and recreation facilities construction		
Temporary traffic control			
73899921	Flagging service (traffic control)		
73899937	Pilot car escort service		
Trucking and hauling			
42120000	Local trucking, without storage		
42120200	Liquid transfer services		
42120201	Liquid haulage, local		
42120202	Petroleum haulage, local		
42129904	Draying, local: without storage		
42129905	Dump truck haulage		
42129908	Heavy machinery transport, local		
42129912	Steel hauling, local		
42130000	Trucking, except local		
42139902	Building materials transport		
42139904	Heavy hauling, nec		
42139905	Heavy machinery transport		
Underground utilities construction			
16230000	Water, sewer, and utility lines		
16230101	Gas main construction		
16230300	Water and sewer line construction		
16230301	Aqueduct construction		
16230302	Sewer line construction		
16230303	Water main construction		
16239901	Electric power line construction		
16239902	Manhole construction		
16239903	Pipe laying construction		
16239904	Pipeline construction, nsk		
16239905	Pumping station construction		
16239906	Underground utilities contractor		

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Other professional services	
Advertising, marketing, graphic design and public relations	
73110000	Advertising agencies
73119900	Advertising agencies, nec
73119901	Advertising consultant
87420300	Marketing consulting services
87420301	Distribution channels consultant
87420303	Merchandising consultant
87430000	Public relations services
87439900	Public relations services, nec
87439902	Promotion service
87439903	Public relations and publicity
87439904	Sales promotion
87480300	Communications consulting
IT and data services (including programming and data processing)	
73710000	Custom computer programming services
73710201	Computer code authors
73710300	Computer software development and applications
73710301	Computer software development
73710302	Software programming applications
73730000	Systems software development services
73730100	Systems software development services
73730101	Computer systems analysis and design
73730102	Systems engineering, computer related
73730200	Systems integration services
73730201	Local area network systems integrator
73730202	Office computer automation systems integration
73730400	Computer-aided system services
73730401	Computer-aided design systems service
73730402	Computer-aided engineering systems service
73740000	Data processing and preparation
73740100	Computer process services
73740101	Calculating service
73740102	Computer graphics service
73740103	Computer time-sharing
73740104	Service bureau, computer
73749901	Data entry service
73749902	Data processing service
73749903	Data verification service
73749905	Optical scanning data service
73750000	Information retrieval services
73759901	Data base information retrieval
73759902	Online data base information retrieval
73759903	Remote data base information retrieval
73760000	Computer facilities management
73780000	Computer maintenance and repair
73789901	Computer and data processing equipment repair/main
73789902	Computer peripheral equipment repair and maintenance
73790000	Computer related services, nec
73790100	Computer related maintenance services
73790101	Disk and diskette conversion service
73790102	Disk and diskette recertification service
73790103	Tape recertification service
73790104	Word processing equipment maintenance
73790105	Computer data escrow service
73790200	Computer related consulting services
73790201	Computer hardware requirements analysis
73790202	Data processing consultant
73790203	Online services technology consultants
73799901	Diskette duplicating service
87429905	Management information systems consultant
87480400	Systems analysis and engineering consulting service
87480401	Systems analysis or design
87480402	Systems engineering consultant, ex. computer or professional
Human resources and job training	
64110104	Pension and retirement plan consultants
83310000	Job training and related services
83310100	Job training services
83310101	Community service employment training program
83310102	Manpower training
83310103	Skill training center
83310104	Vocational training agency
83310105	Work experience center
87410104	Personnel management
87420200	Human resource consulting services
87420201	Compensation and benefits planning consultant
87420202	Incentive or award program consultant
87420203	Labor and union relations consultant
87420204	Personnel management consultant
87420205	Programmed instruction service
87420206	Training and development consultant
82499901	Aviation school
87489903	Employee programs administration
87489909	Safety training service
Business research and consulting	
87320000	Commercial nonphysical research
87320100	Market analysis, business, and economic research
87320101	Business analysis
87320102	Business economic service
87320103	Business research service
87320104	Economic research
87320105	Market analysis or research
87320106	Merger, acquisition, and reorganization research
87320107	Opinion research
87320108	Research services, except laboratory
87320109	Survey service: marketing, location, etc.
87320200	Commercial sociological and educational research
87320201	Educational research
87320202	Sociological research
87420000	Management consulting services
87420501	Corporate objectives and policies consultant
87420502	Corporation organizing consultant
87420503	Materials mgmt. (purchasing, handling, inventory)
87420505	Planning consultant
87429901	Administrative services consultant
87429902	Business management consultant
87429903	Foreign trade consultant
87429904	General management consultant
87429906	Productivity improvement consultant
87429907	Site location consultant
87429908	Financial consultant
87480202	Economic consultant
87480203	Industrial development planning
87489908	Publishing consultant
89999901	Actuarial consultant
Medical insurance management	
64119906	Medical insurance claim processing, contract or fee basis
64110100	Insurance information and consulting services
64119911	Research services, insurance

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Other services	
Staffing services	
73610000	Employment agencies
73610100	Placement agencies
73610101	Executive placement
73610102	Labor contractors (employment agency)
73610104	Teachers' agency
73610202	Maid registry
73610204	Nurses' registry
73630000	Help supply services
73630100	Labor resource services
73630101	Employee leasing services
73630102	Manpower pools
73630103	Temporary help service
73639900	Help supply services, nec
73639903	Engineering help service
73639904	Industrial help service
73639905	Medical help service
Building cleaning and maintenance	
72170000	Carpet and upholstery cleaning
72170100	Carpet and upholstery cleaning on customer premises
72170101	Carpet and furniture cleaning on location
72170102	Upholstery cleaning on customer premises
73490000	Building maintenance services
73490100	Building and office cleaning services
73490101	Building cleaning service
73490102	Building maintenance, except repairs
73490103	Hospital housekeeping
73490104	Janitorial service, contract basis
73490105	Lighting maintenance service
73490106	Office cleaning or charring
73490107	School custodian, contract basis
73490200	Building component cleaning service
73490201	Acoustical tile cleaning service
73490202	Air duct cleaning
73490204	Floor waxing
73490205	Exhaust hood or fan cleaning
73499901	Chemical cleaning services
73499902	Cleaning service, industrial or commercial
73499905	Window blind cleaning
73499906	Window cleaning
Printing and copying	
27410000	Miscellaneous publishing
27520000	Commercial printing, lithographic
27520100	Offset and photolithographic printing
27520300	Business form and card printing, lithographic
27520200	Promotional printing, lithography
73340000	Photocopying and duplicating services
Contracted food services	
58129906	Contract food services
Elevator services	
76992501	Elevators: inspection, service, and repair
Equipment repair services	
76290000	Electrical repair shops
76290200	Electrical equipment repair services
76290201	Electrical equipment repair, high voltage
76290202	Electrical measuring instrument repair and calibrate
76290203	Electronic equipment repair
76290301	Lamp repair and mounting
76290302	Telephone set repair
76299902	Business machine repair, electric
76299903	Circuit board repair
76299904	Generator repair
76299905	Telecommunication equipment repair (except telephone)
76299906	Tool repair, electric
76990500	Industrial equipment repair
76990501	Compressor repair
76990502	Engine repair and replacement, non-automotive
76990503	Industrial equipment cleaning
76990504	Industrial machinery and equipment repair
76990505	Industrial tool grinding
76990506	Industrial truck repair
76990508	Valve repair, industrial
Waste collection and disposal	
49530000	Refuse systems
49530100	Hazardous waste collection and disposal
49530101	Acid waste, collection and disposal
49530102	Chemical detoxification
49530103	Radioactive waste materials, disposal
49530200	Refuse collection and disposal services
49530201	Garbage: collecting, destroying, and processing
49530202	Liquid waste, collection and disposal
49530203	Rubbish collection and disposal
49530204	Street refuse systems
49530300	Nonhazardous waste disposal sites
49530301	Dumps, operation of
49530302	Sanitary landfill operation
49530303	Sludge disposal sites
49539900	Refuse systems, nec
49539901	Ashes, collection and disposal
49539902	Dead animal disposal
49539903	Incinerator operation
49539904	Medical waste disposal
49539905	Recycling, waste materials
Delivery Services	
42150000	Courier services, except by air
42159901	Bicycle delivery service
42159902	Motorcycle delivery service
42159903	Package delivery, vehicular
42159904	Parcel delivery, vehicular
45130000	Air courier services
45139901	Letter delivery, private air
45139902	Package delivery, private air
45139903	Parcel delivery, private air

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Other services (continued)		Goods	
Security guard services		Industrial and agricultural gases and chemicals, fertilizer and pesticides	
73810000	Detective and armored car services	28999944	Sodium chloride, refined
73810100	Guard services	28190912	Magnesium compounds or salts, inorganic
73810102	Burglary protection services	28190902	Calcium chloride and hypochlorite
73810104	Protective services, guard	28730000	Nitrogenous fertilizers
73810105	Security guard service	28740000	Phosphatic fertilizers
		51910100	Fertilizers and agricultural chemicals
		51910102	Fertilizer and fertilizer materials
		51910103	Herbicides
Local Transportation Services		Petroleum and petroleum products	
41110100	Bus transportation	51710000	Petroleum bulk stations and terminals
41110101	Bus line operations	51719901	Petroleum bulk stations
41110102	Commuter bus operation	51719902	Petroleum terminals
41190000	Local passenger transportation, nec	51720000	Petroleum product wholesalers, except bulk stations
87449903	Jails, privately operated	51720100	Gases
		51720101	Butane gas
		51720102	Gases, liquefied petroleum (propane)
		51720200	Engine fuels and oils
		51720201	Aircraft fueling services
		51720202	Diesel fuel
		51720203	Gasoline
		51720204	Lubricating oils and greases
		51720205	Service station supplies, petroleum
		51729902	Fuel oil
		51729903	Kerosene
		51729904	Naphtha
		51729905	Petroleum brokers
Laundry services		Cleaning and janitorial supplies	
72110000	Power laundries, family and commercial	50870300	Cleaning and maintenance equipment and supplies
72119901	Laundry collecting and distributing outlet	50870301	Carpet and rug cleaning equipment and supplies, co
		50870302	Carwash equipment and supplies
		50870303	Floor machinery, maintenance
		50870304	Janitors' supplies
		50870305	Vacuum cleaning systems
Aircraft maintenance and repair services		Furniture	
45810200	Aircraft maintenance and repair services	50210000	Furniture
45810201	Aircraft cleaning and janitorial service	50210100	Office and public building furniture
45810202	Aircraft servicing and repairing	50210102	Cafeteria furniture
45810203	Aircraft upholstery repair	50210104	Filing units
76299901	Aircraft electrical equipment repair	50210105	Lockers
		50210106	Office furniture, nec
		50210107	Public building furniture, nec
		50210109	School desks
		50210205	Tables, occasional
		50210300	Beds and bedding
		50210301	Beds
		50210303	Mattresses
		50219901	Bookcases
		50219902	Chairs
		50219903	Desks, nec
		50219905	Racks
		50219906	Shelving
Security systems services		Office supplies	
73820000	Security systems services	51110000	Printing and writing paper
73829901	Burglar alarm maintenance and monitoring	51119901	Fine paper
73829902	Fire alarm maintenance and monitoring	51119902	Printing paper
73829903	Protective devices, security	51119903	Writing paper
73829904	Confinement surveillance systems maintenance and m	51120000	Stationery and office supplies
		51120400	Computer and photocopying supplies
		51120401	Computer paper
		51120402	Data processing supplies
		51120404	Photocopying supplies
		51120405	Laser printer supplies
		51129904	Envelopes
		51999918	Packaging materials
Landscape maintenance			
07820200	Lawn services		
07830000	Ornamental shrub and tree services		
Digital identity services			
73810202	Fingerprint service		
Facilities operations and support (including corrections)			
87440000	Facilities support services		
87449900	Facilities support services, nec		
87449901	Base maintenance (providing personnel on continuing basis)		
87449902	Correctional facility		
87449903	Jails, privately operated		

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Goods (continued)	
Signs and advertising specialties	Vehicle parts
39930000 Signs and advertising specialties	37130000 Truck and bus bodies
39930100 Electric signs	37130100 Truck bodies and parts
39930101 Neon signs	37130101 Truck beds
39930102 Scoreboards, electric	37130102 Truck bodies (motor vehicles)
39939901 Advertising artwork	37130103 Truck cabs, for motor vehicles
39939902 Advertising novelties	37130104 Truck tops
39939903 Displays and cutouts, window and lobby	50130000 Motor vehicle supplies and new parts
39939904 Displays, paint process	50130100 Automotive supplies and parts
39939905 Letters for signs, metal	50130101 Alternators
39939906 Name plates: except engraved, etched, etc.: metal	50130102 Automobile glass
39939907 Signs, not made in custom sign painting shops	50130103 Automotive batteries
	50130104 Automotive brakes
Farm and garden machinery	50130105 Automotive engines and engine parts
50830200 Lawn and garden machinery and equipment	50130106 Automotive hardware
50830201 Garden machinery and equipment, nec	50130107 Automotive stampings
50830202 Landscaping equipment	50130108 Automotive supplies
50830203 Lawn machinery and equipment	50130109 Automotive trim
50830204 Mowers, power	50130110 Bumpers
50830300 Agricultural machinery and equipment	50130111 Clutches
50830308 Irrigation equipment	50130112 Exhaust systems (mufflers, tail pipes, etc.)
50830312 Tractors, agricultural	50130113 Filters, air and oil
	50130114 Heaters, motor vehicle
Sewage and water treatment equipment	50130115 Pumps, oil and gas
35890300 Sewage and water treatment equipment	50130116 Radiators
35890301 Sewage treatment equipment	50130117 Seat belts
35890302 Sewer cleaning equipment, power	50130118 Springs, shock absorbers and struts
35890303 Swimming pool filter and water conditioning system	50130119 Truck parts and accessories
35890306 Water treatment equipment, industrial	50130120 Wheels, motor vehicle
	50130121 Body repair or paint shop supplies, automotive
Firefighting equipment and supplies	50139901 Motorcycle parts
35690200 Firefighting and related equipment	50139902 Seat covers
35690201 Firefighting apparatus	50139903 Trailer parts and accessories
35690202 Firehose equipment: driers, rack, and reels	55310107 Truck equipment and parts
35690204 Sprinkler systems, fire: automatic	
50870500 Firefighting equipment and supplies	Road salt
	14460000 Industrial sand
Aggregate materials supply	28999943 Salt
50329901 Aggregate	Asphalt, concrete or other paving materials
50329902 Brick, except refractory	29110501 Asphalt or asphaltic materials, made in refineries
50329903 Building blocks, nec	29110505 Road materials, bituminous
50329904 Cement	29110506 Road oils
50329905 Gravel	29110507 Tar or residuum
50329906 Masons' materials	29510000 Asphalt paving mixtures and blocks
50329907 Sand, construction	32419903 Portland cement
50329908 Stone, crushed or broken	32810600 Curbing, paving and walkway stone
Traffic signaling equipment	50320100 Paving materials
36690200 Transportation signaling devices	50320101 Asphalt mixture
36690201 Highway signals, electric	50320102 Paving mixtures
36690203 Pedestrian traffic control equipment	50320500 Concrete and cinder building products
36690205 Signaling apparatus, electric	50320501 Cinders
36690206 Traffic signals, electric	50320502 Concrete and cinder block
50630504 Signaling equipment, electrical	50320503 Concrete building products
	50320504 Concrete mixtures
Animal feed	Vehicle purchases
51910200 Animal feeds	55110000 New and used car dealers
51910201 Alfalfa	55119901 Automobiles, new and used
51910202 Feed	55119902 Pickups, new and used
51910203 Hay	55119903 Trucks, tractors, and trailers: new and used
51910204 Straw	55119904 Vans, new and used
51990300 Pet and pet supplies	

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Goods (continued)	
Food	Food (continued)
20510000 Bread, cake and related products	51490102 Margarine
20530000 Frozen bakery products, except bread	51490103 Oleomargarine
51410000 Groceries, general line	51490104 Shortening, vegetable
51420100 Frozen vegetables and fruit products	51490200 Pet foods
51420101 Fruit juices, frozen	51490201 Cat food
51420102 Fruit pies, frozen	51490202 Dog food
51420103 Fruits, frozen	51490300 Seasonings, sauces, and extracts
51420104 Vegetables, frozen	51490301 Condiments
51420200 Frozen fish, meat, and poultry	51490302 Flavourings and fragrances
51420201 Fish, frozen: packaged	51490303 Fruit peel
51420202 Meat pies, frozen	51490305 Malt
51420203 Meat, frozen: packaged	51490307 Salad dressing
51420204 Poultry pies, frozen	51490308 Salt, edible
51420205 Poultry, frozen: packaged	51490309 Sauces
51429901 Bakery products, frozen	51490310 Spices and seasonings
51429902 Dinners, frozen	51490400 Pasta and rice
51429903 Soup, frozen	51490401 Macaroni
51430000 Dairy products, except dried or canned	51490402 Rice, polished
51430100 Milk	51490403 Spaghetti
51430101 Milk and cream, fluid	51490500 Beverages, except coffee and tea
51430102 Milk cooling stations	51490501 Beverage concentrates
51430103 Milk depot	51490502 Juices
51439901 Butter	51490503 Mineral or spring water bottling
51439902 Cheese	51490504 Soft drinks
51439903 Dairy depot	51490505 Water, distilled
51439904 Frozen dairy desserts	51490600 Organic and diet food
51439905 Ice cream and ices	51490601 Diet foods
51439906 Yogurt	51490602 Health foods
51440000 Poultry and poultry products	51490603 Natural and organic foods
51449901 Eggs	51490604 Specialty food items
51449902 Eggs: cleaning, oil treating, packing, and grading	51490700 Crackers, cookies, and bakery products
51449903 Poultry products, nec	51490701 Bakery products
51449904 Poultry: live, dressed or frozen (unpackaged)	51490702 Cookies
51450000 Confectionery	51490703 Crackers
51450100 Fountain supplies	51490800 Dried or canned foods
51450101 Fruits, fountain	51490801 Canned goods: fruit, vegetables, seafood, meats, e
51450102 Syrups, fountain	51490802 Dairy products, dried or canned
51450103 Toppings, soda fountain	51490803 Fruits, dried
51450200 Snack foods	51490804 Milk, canned or dried
51450201 Corn chips	51490805 Soups, except frozen
51450202 Nuts, salted or roasted	51490900 Coffee and tea
51450203 Popcorn and supplies	51490901 Coffee, green or roasted
51450204 Potato chips	51490902 Tea
51450205 Pretzels	51490903 Tea bagging
51459901 Candy	51491000 Sugar, honey, molasses, and syrups
51459902 Chewing gum	51491001 Honey
51460000 Fish and seafoods	51491002 Molasses, industrial
51469901 Fish, cured	51491003 Sugar, refined
51469902 Fish, fresh	51491004 Syrups, except for fountain use
51469903 Fish, frozen, unpackaged	51491100 Baking supplies
51469904 Seafoods	51491101 Flour
51470000 Meats and meat products	51491102 Starch
51479901 Lard	51491103 Wet corn milling products
51479902 Meat brokers	51491104 Yeast
51479903 Meats, cured or smoked	51499901 Breakfast cereals
51479904 Meats, fresh	51499902 Chocolate
51480000 Fresh fruits and vegetables	51499903 Cocoa
51480100 Fruits	51499904 Food gift baskets
51480101 Banana ripening	51499905 Pickles, preserves, jellies, and jams
51480102 Fruits, fresh	51499906 Pizza supplies
51480200 Vegetables	51499907 Sandwiches
51480201 Potatoes, fresh	51499908 Sausage casings
51480202 Vegetables, fresh	51499909 Wine makers' equipment and supplies
51490000 Groceries and related products, nec	51499910 Sandwich supplies
51490100 Cooking oils and shortenings	51499911 Breeding mixes
51490101 Cooking oils	

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Goods (continued)	
Building materials and supplies (continued)	
50510217	Structural shapes, iron or steel
50510220	Steel decking
50510300	Copper products
50510301	Copper
50510302	Copper sheets, plates, bars, rods, pipes, etc., ne
50510400	Miscellaneous nonferrous products
50510401	Anode metal
50510402	Lead
50510403	Mercury
50510404	Nonferrous metal sheets, bars, rods, etc., nec
50510405	Tin and tin base metals, shapes, forms, etc., nec
50510406	Tin plate
50510408	Zinc
50519901	Aluminum bars, rods, ingots, sheets, pipes, plates
50519902	Bars, metal
50519903	Foundry products
50519904	Ingots
50519905	Nails
50519906	Plates, metal
50519907	Rods, metal
50519908	Sheets, galvanized or other coated
50519909	Sheets, metal
50519910	Strip, metal
50519911	Tubing, metal
50519912	Stampings, metal
50720000	Hardware
50740000	Plumbing and hydronic heating supplies
50990304	Reflective road markers
50999912	Signs, except electric
52110000	Lumber and other building materials
52310000	Paint, glass and wallpaper
Electrical equipment and supplies	
36250000	Relays and industrial controls
36290000	Electrical industrial apparatus, nec
36990000	Electrical equipment and supplies, nec
50630000	Electrical apparatus and equipment
50630200	Electrical fittings and construction materials
50630300	Wire and cable
50650000	Electronic parts and equipment, nec
50650300	Electronic parts
50650301	Capacitors, electronic
50650302	Cassettes, recording
50650303	Coils, electronic
50650304	Condensers, electronic
50650305	Connectors, electronic
50650306	Diodes
50650307	Rectifiers, electronic
50650308	Resistors, electronic
50650309	Semiconductor devices
50650310	Transformers, electronic
50650311	Transistors
50659900	Electronic parts and equipment, nec
Restaurant Equipment	
50460300	Commercial cooking and food service equipment
50460301	Bakery equipment and supplies
50460302	Coffee brewing equipment and supplies
50460303	Cooking equipment, commercial
50460304	Food warming equipment
50460305	Ovens, microwave: commercial
50460306	Restaurant equipment and supplies, nec
50460307	Soda fountain fixtures, except refrigerated
50469901	Balances, excluding laboratory
50879908	Restaurant supplies
Refrigeration and heating equipment	
35850000	Refrigeration and heating equipment
35850100	Air conditioning equipment, complete
35850101	Air conditioning units, complete: domestic or industrial
35850200	Refrigeration equipment, complete
35850205	Lockers, refrigerated
35850300	Heating equipment, complete
35850301	Furnaces, warm air: electric
35850302	Heat pumps, electric
35850400	Parts for heating, cooling, and refrigerating equipment
35850401	Air conditioning condensers and condensing units
35850402	Compressors for refrigeration and air conditioning
35850403	Condensers, refrigeration
35850404	Evaporative condensers, heat transfer equipment
35850600	Humidifiers and dehumidifiers
35859900	Refrigeration and heating equipment, nec
35859901	Heating and air conditioning combination units
50750000	Warm air heating and air conditioning
50750100	Air conditioning and ventilation equipment and sup
50750101	Air conditioning equipment, except room units, nec
50750102	Air filters
50750105	Compressors, air conditioning
50750106	Condensing units, air conditioning
50750107	Dehumidifiers, except portable
50750110	Humidifiers, except portable
50750200	Warm air heating equipment and supplies
50750201	Electrical heating equipment
50750202	Furnaces, heating: electric
50750203	Furnaces, warm air
50750204	Heat exchangers
50750205	Thermostats
50780000	Refrigeration equipment and supplies
Heavy construction equipment	
35310000	Construction machinery
35310400	Bituminous, cement and concrete related products and equipment
35310500	Scrapers, graders, rollers and similar equipment
35310600	Backhoes, tractors, cranes, plows and similar equipment
35310700	Crushers, grinders and similar equipment
35310800	Construction machinery attachments
35319900	Construction machinery, nec
35360000	Hoists, cranes and monorails
37110407	Road oilers (motor vehicles), assembly of
37110408	Snow plows (motor vehicles), assembly of
37110409	Street flushers, assembly of
37110410	Street sprinklers and sweepers (motor vehicles), assembly of
37130206	Cement mixer bodies
37130207	Dump truck bodies
50820000	Construction and mining machinery
50820100	Road construction equipment
50820300	General construction machinery and equipment
50829900	Construction and mining machinery, nec
50829901	Bailey bridges
50829902	Blades for graders, scrapers, dozers and snow plows
50829903	Front end loaders
50829904	Graders, motor
50829905	Mixers, construction and mining
Clothing and uniforms	
31439905	Work shoes, men's
31440000	Women's footwear, except athletic
56990100	Uniforms and work clothing
56990102	Uniforms
56990103	Work clothing

Figure D-1 (continued).
D&B 8-digit codes for D&B availability survey list source

Goods (continued)	
Building materials and supplies	Building materials and supplies
29520000 Asphalt felts and coatings	34430300 Boiler and boiler shop work
29520100 Roofing materials	34430600 Liners/lining
30890300 Plastics hardware and building products	34430700 Metal parts
32419901 Masonry cement	34430800 Chutes and troughs
32419902 Natural cement	34430900 Pipe, standpipe and culverts
32419904 Pozzolana cement	34440000 Sheet metalwork
32510000 Brick and structural clay tile	34460000 Architectural metalwork
32530000 Ceramic wall and floor tile	34480000 Prefabricated metal buildings and components
32550000 Clay refractories	34480100 Prefabricated metal buildings
32590000 Structural clay products, nec	34490100 Fabricated bar joists and concrete reinforcing bars
32610000 Vitreous plumbing fixtures	34490200 Metal plaster bases
32640000 Porcelain electrical supplies	34499900 Miscellaneous metalwork, nec
32649900 Porcelain electrical supplies, nec	35340000 Elevators and moving stairways
32649901 Cleats, porcelain	35340100 Elevators and equipment
32649902 Ferrite and ferrite parts	35340102 Stair elevators, motor powered
32649903 Insulators, electrical: porcelain	35349900 Elevators and moving stairways, nec
32649904 Knobs, porcelain	35350102 Passenger baggage belt loaders
32710000 Concrete block and brick	35640000 Blowers and fans
32720000 Concrete products, nec	50310000 Lumber, plywood, and millwork
32730000 Ready-mixed concrete	50320000 Brick, stone, and related material
32810300 Building stone products	50320200 Plastering materials
32810400 Slate products	50320201 Drywall materials
32819900 Cut stone and stone products, nec	50320202 Stucco
32990000 Nonmetallic mineral products	50320300 Tile and clay products
32990100 Mica products	50320301 Ceramic construction materials, excluding refractor
32990200 Sand lime products	50320302 Ceramic wall and floor tile, nec
32990300 Ornamental and architectural plaster work	50320303 Clay construction materials, except refractory
32999902 Floor composition, magnesite	50320304 Sewer pipe, clay
33120400 Structural and rail mill products	50320305 Terra cotta
33120500 Bar, rod and wire products	50320306 Tile, clay or other ceramic, excluding refractory
33120600 Pipes and tubes	50320307 Tile, structural clay
33150000 Steel wire and related products	50320400 Building stone
33170000 Steel pipe and tubes	50320401 Granite building stone
33210000 Gray and ductile iron foundries	50320402 Marble building stone
33210100 Cast iron pipe and fittings	50320600 Lime building products
33210101 Pressure pipe and fittings, cast iron	50320601 Lime, except agricultural
33210102 Sewer pipe, cast iron	50320602 Limestone
33210103 Soil pipe and fittings, cast iron	50330000 Roofing, siding, and insulation
33210104 Water pipe, cast iron	50390000 Construction materials, nec
33219900 Gray and ductile iron foundries, nec	50399914 Metal guardrails
33219905 Manhole covers, metal	50510000 Metals service centers and offices
34290100 Furniture, builders' and other household hardware	50510100 Metal wires, ties, cables, and screening
34290101 Builders' hardware	50510101 Bale ties, wire
34290102 Cabinet hardware	50510102 Cable, wire
34290103 Door opening and closing devices, except electrical	50510103 Reinforcement mesh, wire
34290200 Keys, locks and related hardware	50510104 Rods, wire (not insulated)
34310000 Metal sanitary ware	50510105 Rope, wire (not insulated)
34320000 Plumbing fixture fittings and trim	50510106 Wire screening
34330000 Heating equipment, except electric	50510107 Wire, nec
34410000 Fabricated structural metal	50510200 Iron and steel (ferrous) products
34410200 Fabricated structural metal for bridges	50510201 Bearing piles, iron or steel
34419900 Fabricated structural metal, nec	50510202 Black plate, iron or steel
34420000 Metal doors, sash and trim	50510203 Cast iron pipe
34430000 Fabricated plate work (boiler shop)	50510204 Castings, rough: iron or steel
34430100 Industrial vessels, tanks and containers	50510205 Concrete reinforcing bars
34430101 Autoclaves, industrial	50510206 Ferroalloys
34430102 Bins, prefabricated metal plate	50510207 Ferrous metals
34430103 Columns (fractioning, etc.): metal plate	50510208 Forgings, ferrous
34430104 Cryogenic tanks, for liquids and gases	50510209 Forms, concrete construction (steel)
34430105 Cyclones, industrial: metal plate	50510210 Iron or steel flat products
34430106 Digesters, process: metal plate	50510211 Iron or steel semi finished products
34430107 Drums, knockout (reflux etc.): metal plate	50510212 Pig iron
34430108 Dumpsters, garbage	50510213 Piling, iron and steel
34430119 Tank towers, metal plate	50510214 Pipe and tubing, steel
34430120 Tanks for tank trucks, metal plate	50510215 Rails and accessories
34430200 Heat exchangers, condensers and components	50510216 Steel

B. Development of the Survey Instruments

Keen Independent developed the survey instruments and obtained State staff review before performing the surveys. The final survey instrument is presented at the end of this Appendix.

The availability survey included ten sections. The study team did not know the race, ethnicity, gender or disability status of the business owner when contacting a business establishment. Obtaining that information was a key component of the survey. Areas of survey questions included:

- **Identification of purpose.** The surveys began by identifying the State of Colorado (including CDOT and community colleges) as the survey sponsor and describing the purpose of the study (i.e., identifying companies interested in doing businesses with State agencies).
- **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 survey.
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the survey with businesses that responded “yes” to that question.
- **Identification of main lines of business.** The study team asked businesses to briefly describe their main line of business as an open-ended question. In a later section (B) for construction and construction-related professional services businesses, respondents then selected from a list the types of work that their firm performed (interviewees could select multiple responses). All businesses not performing construction work or construction-related professional services were instead asked an open-ended question about what additional types of work their business performs.
- **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 relevant responses from multiple locations into a single record for multi-establishment firms.)
- **Past bids or work related to public agencies.** The survey then asked about bids and work on past public sector contracts in Colorado. The questions were asked in connection with both prime contracts and subcontracts.

- **Qualifications and interest in future State work.** The interviewer asked about businesses’ qualifications and interest in future work with State agencies in Colorado, and for some firms, whether they were interested in prime contracts and/or subcontracts. (Keen Independent did not ask companies providing goods, services or non-construction-related professional services whether they were interested in working as subcontractors as this is less relevant than in construction or for construction-related professional services.)
- **Geographic areas.** Interviewees were asked whether they could do work in five different geographic regions of Colorado: the Front Range (from Greeley to Pueblo, including Denver), Northeast Colorado (such as Fort Morgan or Burlington), Southeast Colorado (such as Trinidad or Lamar), Southwest Colorado (such as Durango or Alamosa) and Northwest Colorado (such as Grand Junction or Steamboat Springs).
- **Largest contracts.** The study team asked businesses to identify the value of the largest contract or subcontract on which they had bid or had been awarded in Colorado during the past six years.
- **Ownership.** Businesses were asked if more than 50 percent of the firm was owned and controlled by women, persons with a physical or mental impairment and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners.⁴ For companies that identified race/ethnicity as “other,” Keen Independent reviewed and assigned the correct minority classification when possible and otherwise identified them as “majority-owned.”
- **Business background.** The study team asked respondents to identify the approximate year in which the business was 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 on whether barriers came to mind about starting and expanding a business or achieving success in their industry in Colorado. In addition, this section included a question asking whether interviewees would be willing to participate in an in-depth interview about marketplace conditions.

⁴ The availability survey did not ask whether businesses were owned by members of the LGBT community. This question was addressed by matching the available firms with certified LGBT business lists.

C. Execution of Availability Surveys

Keen Independent held planning and training sessions with CRI as part of the launch of the availability surveys. CRI began conducting full availability surveys in April of 2020 and completed the surveys in June 2020.

To minimize non-response, CRI made at least five attempts at different times of day and on different days of the week to reach each business establishment. These call-backs occurred through the spring of 2020. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

Establishments that the study team successfully contacted. Figures D-2 and D-3 present the dispositions of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning with a list of 48,880 unique businesses).

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (6,007); or
- Wrong numbers for the desired businesses (430).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names. Those phone numbers could also have changed between the time that a source listed them and the time that the study team attempted to contact them.

Figure D-2.
Disposition of attempts to survey business establishments

Note:
Study team made at least five attempts to complete an interview with each establishment.

Source:
Keen Independent Research from 2020 Availability Surveys.

	Number of firms	Percent of business listings
Beginning list (unique businesses)	48,880	
Less non-working phone numbers	6,007	
Less wrong number	430	
Firms with working phone numbers	42,443	100 %
Less no answer	21,660	
Less could not reach responsible staff member	2,338	
Less could not continue in English or Spanish	61	
Less unreturned fax/email	1,295	
Less said they already completed the survey but didn't	37	
Firms successfully contacted	17,052	40 %

Working phone numbers. As shown in Figure D-2, there were 42,443 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 (21,660 establishments).
- **Could not reach responsible staff member.** For some businesses (2,338), a responsible staff person could not be reached to complete the survey after repeated attempts.
- **Could not complete the survey in English or Spanish.** Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, as appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, CRI completed a shortened version of the survey with the interviewee. If the business wanted to complete the full survey via fillable PDF questionnaire (in English), it was then sent. This approach appeared to eliminate some of the potential language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for 61 companies, about 0.14 percent of the businesses with working phone numbers.
- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax or email. There were 1,295 businesses that requested such surveys but did not return them. After sending the survey via fax or email, the study team later followed up with each of these firms to remind them to complete the survey.
- **Respondent indicated that they had already completed a survey.** There were 37 respondents who said that they had already completed a PDF or phone survey that were not found within the survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 17,052 businesses, or 40 percent of those with working phone numbers. This response rate is consistent with similar availability surveys Keen Independent has performed in other states in recent years.

Establishments included in the availability database. Figure D-3 presents the disposition of the 17,052 businesses the study team successfully contacted and how that number resulted in the 2,140 businesses the study team included in the availability database.

Figure D-3.
Disposition of successfully
contacted businesses

Note:
Study team made at least five attempts
to complete an interview with each
establishment.

Source:
Keen Independent Research from
2020 Availability Surveys.

	Number of firms
Firms successfully contacted	17,052
Less business not interested	12,243
Less no longer in business	1,327
Less don't do related work	15
Firms that completed interviews about business characteristics	3,467
Less not a for-profit business	1,359
Less firms with no location in the study area	9
Qualified firms from initial list	2,099
Plus other firms that completed the online survey	41
Total firms included in availability database	2,140

Establishments not interested in discussing availability for State agency work. Of the 17,052 businesses that the study team successfully contacted, 12,243 were not interested in discussing their availability for State agency work, or reported they were not qualified to work with State agencies as a prime contractor or subcontractor. In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work. Another 1,327 respondents indicated that their companies were no longer in business, and 15 firms were found to not perform work related to State agency contracts.

Businesses included in the availability database. Some firms responding to availability surveys were not included in the final availability database because they indicated that they were not a for-profit business or did not have a location within the study area.

- Of the completed surveys, 1,359 indicated that they were not a for-profit business (including nonprofits or government agencies). Surveys ended when respondents reported that their establishments were not for-profit businesses.
- There were nine firms surveyed that did not have a location within the study area (Keen Independent attempted to find a Colorado location for each of these firms but was unsuccessful).

After those final screening steps, the survey effort produced a database of 2,099 businesses potentially available for Colorado State agency work. An additional 41 businesses completed a PDF survey indicating their availability for State agency work, creating a final database of 2,140 potentially available firms.

Coding responses from multi-location businesses. There were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses. Each unique business was only counted once in the tables above.

D. Additional Considerations Related to Measuring Availability

The study team made several additional determinations related to its approach to measuring availability.

Not providing a count of all businesses available for State work. The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of all firms available for State contracts that were MBEs, WBEs, owned by persons with disabilities or owned by members of the LGBT community.

- The research appropriately focused on firms in the relevant geographic area for State contracts in the subindustries relevant to State agency work. Firms in subindustries that comprised a very small portion of State agency work were not included in the surveys.
- The study team did not purchase D&B data for firms outside Colorado and not all firms on the list of businesses completed surveys, even after repeated attempts to contact them.
- There were some firms receiving State of Colorado agency work that did not complete an availability survey. Further research indicated that some were out of business by the time that the survey was conducted or might have been no longer interested in State agency work. Keen Independent reviewed firms receiving the highest dollar amounts of State contracts and found that most of these businesses were contacted in the course of the availability interviews. Of those businesses, some were either located outside Colorado or performed types of businesses outside the focus of the availability survey, some could not be reached or declined to respond to the survey, and other businesses completed the survey and were included in the availability database. Keen Independent's analysis of MBE/WBE and majority-owned firms receiving State contracts found that MBE/WBEs were as or more likely to have completed an availability survey as majority-owned firms.

Therefore, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of State agency work and should not be used in that way.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study, as discussed in Appendix B. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.⁵

⁵ Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

Not using a “headcount” based solely on State of Colorado business lists. Keen Independent used State interested firms lists as a starting point but also contacted other firms potentially available for those contracts by purchasing the larger D&B list. This helped capture firms that might have been discouraged from pursuing State agency work and would not have previously registered in the SuSS or ColoradoVSS.

Keen Independent’s approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses’ qualifications, size of contracts they bid on and interest in State agency work, which allowed the study team to take a more refined approach to measuring availability.

Using D&B lists. Keen Independent supplemented business lists obtained from the State with D&B business listings for Colorado. 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 Colorado 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.⁶
- Some businesses providing State agency-related work might not be classified as such in the D&B data.

Because Keen Independent used multiple State agency data sources of business listings for the availability analysis as well as D&B lists, the final survey list captures some firms not included in the D&B data. (The study team estimates that about 19 percent of the completed surveys were firms not among the businesses on the list purchases from D&B, although they could still be in the D&B data under a different line of work.)

Selection of specific subindustries. Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent’s use of additional State data (SuSS and Colorado VSS) for Colorado businesses mitigates this potential concern.

⁶ McManus, M. (2016). *Minority business ownership: Data from the 2012 Survey of Business Owners* (Issue Brief No. 12). U.S. Small Business Administration, Office of Advocacy. <https://cdn.advocacy.sba.gov/wp-content/uploads/2016/09/07141514/Minority-Owned-Businesses-in-the-US.pdf> (accessed November 20, 2019).

Large number of companies reporting that they do not perform related work or were not interested in discussing State agency work. Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in State agency work. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

For example, one cannot know based upon the D&B data, which electrical firms perform public works projects and which are focused on residential work. Therefore, Keen Independent acquired a general list of electrical firms (code 17310000), and through surveys identified which firms would be able to perform electrical work on State projects. Many were not.

There were a few companies that had actually performed State contracts but responded in the availability survey that they were not interested in discussing their availability for State agency work or did not perform relevant work. These firms accounted for only 4 percent of the total of such responses, and there was no indication that MBE/WBEs, firms owned by persons with disabilities or members of the LGBT community were underrepresented in the final availability database due to these types of responses.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort.

The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees;
- Calling from outside Colorado; and
- Language barriers.

Research sponsorship. Non-response bias in the availability analysis was minimized in part because interviewers introduced themselves by identifying the State of Colorado as the survey sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. As discussed below, any such differences do not lead to lower availability estimates for MBEs, WBEs, disabled-owned businesses or LGBT-owned businesses than if the study team had been able to successfully reach all firms.

- Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability and availability of businesses owned by persons with disabilities or LGBT individuals 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 relative availability of businesses within particular work fields. If trucking firms were less likely to complete a survey, both the number of MBE/WBE, disabled-owned and LGBT-owned trucking firms captured in the survey and the total number of trucking firms in the survey would decrease proportionately. HUB businesses as a share of all businesses successfully contact might not change.

Keen Independent also examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that D&B had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B Hoovers source) that were successfully contacted, MBE/WBEs were just slightly more likely to be successfully contacted than majority-owned firms. Based on D&B identification of ownership, MBE/WBE firms were 9.39 percent of the initial list and 9.87 percent of successfully surveyed firms. (Note that D&B records under-identify MBE/WBEs and are not the basis for the availability analysis.)

Therefore, there is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study. D&B does not provide information on whether businesses are owned by disabled persons or members of the LGBT community, so the study team was not able to perform similar analyses for such businesses.

Calling from outside Colorado. Telephone calls made by CRI interviewers originated from outside the state. This might have reduced the overall response rate. However, there was no indication that minority- and women-owned firms were less likely to respond to the calls than white male-owned businesses. Similarly, the study team did not find evidence that disabled-owned or LGBT-owned businesses were less likely to respond to calls than businesses not owned by disabled persons or members of the LGBT community, respectively.

Potential language barriers. Because of the methods explained previously in this Appendix, any language barriers were minimal. Study results do not appear to have been affected by conducting the principal portions of the availability survey in English.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of MBE/WBE/DBE-certified businesses obtained from CDOT and the City and County of Denver that were compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past six years with actual State contract data.

COVID-19. The study team considered the impact of the COVID-19 pandemic on the availability survey results.

Phone participation. A portion of the availability survey took place during the State’s stay-at-home period due to COVID-19, which began in late March 2020.⁷ The remainder of the survey took place during the second safer-at-home period as Colorado businesses began to reopen starting in late April 2020.⁸ The study team continued survey efforts for approximately two months after the reopening process began, which likely allowed for contact with some businesses that would not have been reached during the stay-at-home order.

Online participation. As mentioned above, the State sent multiple emails in which it directed vendors to the disparity study website, where firms were able to download and respond to the survey. Additionally, all firms reached by phone had the opportunity to complete a PDF or fax survey, including the opportunity to send a survey via email to personnel possibly working from home due to the pandemic.

Lack of interest due to COVID-19. A small number of businesses (18) indicated the COVID-19 pandemic as a reason for not answering the survey, either because they were no longer in business due to the pandemic (3 firms), they wanted to wait until after the pandemic is over (8 businesses) or they were temporarily closed or the appropriate person was not reachable due to the pandemic (7). An additional 35 businesses did not explicitly mention COVID-19 (or the coronavirus) but declined to take the survey and provided vague responses which could have been related to COVID-19. Overall, of the 42,443 businesses with working phone numbers, about one-tenth of 1 percent directly or indirectly reported COVID-19 as a reason for not completing an availability survey.

A copy of the survey instrument for construction follows.

⁷ Polis, Jared. Executive Order D 2020 017. https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20017%20Ordering%20Coloradans%20to%20Stay%20at%20Home_0.pdf

⁸ Polis, Jared. Executive Order D 2020 024. https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order_0.pdf

E. Availability Survey Instrument

STATE OF COLORADO FAX/EMAIL SURVEY

The information developed in these surveys will add to the State's existing data on companies interested in doing business with state and local agencies.

Survey Instructions

When you have finished the survey, please:

- 1) Scan completed survey and email to surveys@cri-research.com; or
- 2) Fax completed survey to 512-353-3696.

If you have any questions, please contact:

Michelle Arnold
Colorado Department of Personnel & Administration
303-866-4911
michellem.arnold@state.co.us

(Do not return completed surveys to Michelle Arnold. See instructions above.) You may also visit www.keenindependent.com/coloradodisparitystudy2020 to learn more.

Z5. What is the name of your business?

Z8. Address of business (if multiple offices, choose a Colorado location if possible):

City (Required): _____

State (Required): _____

ZIP: _____

A2. Is your firm a for-profit business (as opposed to a nonprofit organization, a foundation or a government office)?

01 = Yes

02 = No

98 = Don't know

A4. What would you say is the main line of business of your company?

A5. Is this the sole location for your business, or do you have offices in other locations?

01 = Sole location

02 = Have other locations

98 = Don't know

A6. Is your company a subsidiary or affiliate of another firm?

01 = Independent [SKIP TO B1]

02 = Subsidiary or affiliate of another firm

98 = Don't know [SKIP TO B1]

A7. What is the name of your parent company?

98 = Don't know

B1. Which of the following types of construction-related work does your firm perform?
Select all that apply.

01 = Highway, street and bridge construction

02 = Office and public building construction

03 = School building construction

04 = Electrical work

05 = Excavation, site prep, grading and drainage

06 = Asphalt, concrete or other paving

07 = Temporary traffic control

08 = Roofing

09 = Underground utilities

10 = Plumbing, heating and air conditioning

11 = Landscape contracting

12 = Drilling and foundations

13 = Concrete work

14 = Installation of guardrails, fencing or signs

15 = Trucking and hauling

20 = Architecture and engineering

21 = Construction management

88 = Other (Please specify): _____

98 = Don't know

C1. The next questions are about your company's role in construction work. During the past six years, has your company bid on or been awarded work related to public agencies, colleges or other government-related projects in Colorado?

1 = Yes

2 = No [SKIP TO C3]

98 = Don't know [SKIP TO C3]

C2. For those bids or awards, which of the following describes your role?
Please select all that apply.

1 = Prime contractor

2 = Subcontractor

3 = Trucker or hauler

4 = Supplier or manufacturer

98 = Don't know

C3. Is your company qualified and interested in working with state agencies as a prime contractor?

1 = Yes

2 = No

98 = Don't know

C4. Is your company qualified and interested in working with state agencies as a subcontractor?

1 = Yes

2 = No

98 = Don't know

The next questions are about the geographic areas in Colorado where your company can deliver goods, perform work or serve customers.

D1. Can your company serve the Front Range region? (From Greeley to Pueblo, including Denver)

1 = Yes

2 = No

98 = Don't know

D2. Can your company serve Northeast Colorado? (Such as Fort Morgan or Burlington)

1 = Yes

2 = No

98 = Don't know

D3. Can your company serve Southeast Colorado? (Such as Trinidad or Lamar)

1 = Yes

2 = No

98 = Don't know

D4. Can your company serve Southwest Colorado? (Such as Durango or Alamosa)

1 = Yes

2 = No

98 = Don't know

D5. Can your company serve Northwest Colorado? (Such as Grand Junction and Steamboat Springs)

1 = Yes

2 = No

98 = Don't know

E1. In rough dollar terms, in the past six years what was the largest contract or subcontract your company was awarded, bid on, or submitted quotes for anywhere in Colorado?

1 = \$100,000 or less

2 = More than \$100,000 up to \$500,000

3 = More than \$500,000 up to \$1 million

4 = More than \$1 million up to \$2 million

5 = More than \$2 million up to \$5 million

6 = More than \$5 million up to \$10 million

7 = More than \$10 million up to \$20 million

8 = More than \$20 million up to \$100 million

9 = More than \$100 million

97 = Not applicable

98 = Don't know

The next questions are about the ownership of the business.

F1. A business is defined as woman-owned if more than half — that is, more than 50 percent — 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

F2. A business is defined as disabled-owned if more than half — that is, more than 50 percent — of the ownership and control is by a person with a physical or mental impairment that substantially limits one or more major life activities. By this definition, is your firm a disabled-owned business?

1 = Yes

2 = No

98 = Don't know

F3. A business is defined as minority-owned if more than half — that is, more than 50 percent — of the ownership and control is African American, Asian American, Hispanic American, Native American or another minority group. By this definition, is your firm a minority-owned business?

1 = Yes

2 = No [SKIP TO G1]

98 = Don't know [SKIP TO G1]

F4. 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 (This includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, the United States territories of the Pacific, or the Northern Mariana Islands; or persons whose origins are from subcontinent Asia, including persons whose origins are from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, or Nepal.)

3 = Hispanic American or Portuguese American (This includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.)

4 = Native American (This includes American Indians, Eskimos, Aleuts or Hawaiians of Polynesian descent.)

5 = Other group (Please specify): _____

98 = Don't know

The next questions are about the background of the business.

G1. About what year was your firm established?

98 = Don't know

The next set of questions pertain to annual averages for your company for the past five years (or just years in business if formed after 2015).

- G3. About how many employees did you have working out of just your location, on average, over the past five years? (This includes employees who work at your location and those who work from your location.)

98 = Don't know

- G5. Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past five years.

1 = Up to \$0.5 million

2 = More than \$0.5 million up to \$1 million

3 = More than \$1 million up to \$3.5 million

4 = More than \$3.5 million up to \$8 million

5 = More than \$8 million up to \$12 million

6 = More than \$12 million up to \$16.5 million

7 = More than \$16.5 million up to \$24 million

8 = More than \$24 million up to \$30 million

9 = More than \$30 million up to \$39.5 million

10 = More than \$39.5 million

98 = Don't know

- G6. [SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS] About how many employees did you have, on average, for all of your locations over the past five years?

(Number of employees at all locations should not be fewer than at just your location.)

G7. [SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS] Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past five years.

(Revenue at all locations should not be less than at just your location.)

- 1 = Up to \$0.5 million
- 2 = More than \$0.5 million up to \$1 million
- 3 = More than \$1 million up to \$3.5 million
- 4 = More than \$3.5 million up to \$8 million
- 5 = More than \$8 million up to \$12 million
- 6 = More than \$12 million up to \$16.5 million
- 7 = More than \$16.5 million up to \$24 million
- 8 = More than \$24 million up to \$30 million
- 9 = More than \$30 million up to \$39.5 million
- 10 = More than \$39.5 million
- 98 = Don't know

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion, or with obtaining work. Think about your experiences in the past six years in Colorado as you answer these questions.

H1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

- 1 = Yes
- 2 = No
- 97 = Does not apply
- 98 = Don't know

H1b. Has your company obtained or tried to obtain a bond for a project or contract?

1 = Yes

2 = No [SKIP TO H1d]

97 = Does not apply [SKIP TO H1d]

98 = Don't know [SKIP TO H1d]

H1c. Has your company had any difficulties obtaining bonds needed for a project or contract?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1d. Have you had any difficulty in being prequalified for work?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1e. Have any insurance requirements on projects presented a barrier to bidding?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1f. Has the large size of projects presented a barrier to bidding?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1g. Has your company experienced any difficulties learning about bid opportunities with state agencies in Colorado?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1h. Has your company experienced any difficulties learning about bid opportunities in the private sector in general in Colorado?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1i. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors in Colorado?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1j. Has your company experienced any difficulties receiving payment from state agencies in Colorado?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1k. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1l. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1m. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1o. Has your company experienced any difficulties with brand name specifications or other restrictions on bidding?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1p. Has your company experienced any difficulties obtaining supply or distributorship relationships?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H1q. Has your company experienced any competitive disadvantages due to the pricing you get from your suppliers?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

H2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Colorado?

1 = Yes [Please provide your thoughts in the box below.]

2 = No

97 = Does not apply

98 = Don't know

H3. Would you be willing to participate in a follow-up interview about any of these issues?

1 = Yes

2 = No

97 = Does not apply

98 = Don't know

Just a few last questions.

I1. What is your full name?

I2. What is your position at the firm?

1 = President

2 = Owner

3 = Manager

4 = CFO

5 = CEO

6 = Assistant to Owner/CEO

7 = Sales manager

08 = Office manager

09 = Receptionist

88 = Other (Please specify) _____

14. What mailing address could state agencies use to contact you?

Street Address: _____

City: _____

State: _____

ZIP: _____

15P. What phone number could state agencies use to contact you?

16. What e-mail address could state agencies use to contact you?

Survey Instructions

When you have finished the survey, please:

- 1) Scan completed survey and email to surveys@cri-research.com; or
- 2) Fax completed survey to 512-353-3696.

Thank you for your time. This is very helpful for the State of Colorado.

APPENDIX E.

Entry and Advancement in the Colorado Marketplace

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses and of barriers to entry.”¹ Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers that Congress found appear to occur in Colorado for people of color and women. The study team also examines conditions in the relevant industries for persons with disabilities and LGBT individuals.

Potential barriers to business formation include potential disadvantages for certain groups associated with entering and advancing as employees in the study industries. Appendix E examines recent data on employment and workplace advancement that may ultimately influence business formation within the Colorado study industries.^{2, 3}

A. Introduction

Keen Independent examined whether there were barriers to the formation of businesses owned by minorities, women, persons with disabilities and LGBT individuals in Colorado. Business ownership typically results from an individual entering an industry as an employee and then advancing within that industry before starting a business in that sector. Within the entry and advancement process, there may be barriers that limit opportunities for some individuals. Figure E-1 presents a model of entry and advancement in the study industries.

Note that Keen Independent considers the entire state of Colorado to represent the Colorado marketplace. Any discussion of the Colorado marketplace or Colorado study industries in the following analysis includes firms and individuals located in the state. “Study industries” are construction, construction-related professional services, brokerage and investment, other professional services, goods and other services industries. After presenting overall demographic characteristics for the study industries as a whole, Keen Independent separately examines results for each industry as the pathways into these industries and career ladders for employees differ between industries.

¹ *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d (10th Cir. 2000); *Western States Paving Co., Inc. v. Washington State DOT*, 345 F.3d 964 (8th Cir. 2003).

² In Appendix E and other appendices that present information about local marketplace conditions, information for “construction-related professional services” refers to architectural, engineering and related services. References to “other professional services” pertain to professional services other than architectural, engineering and related services.

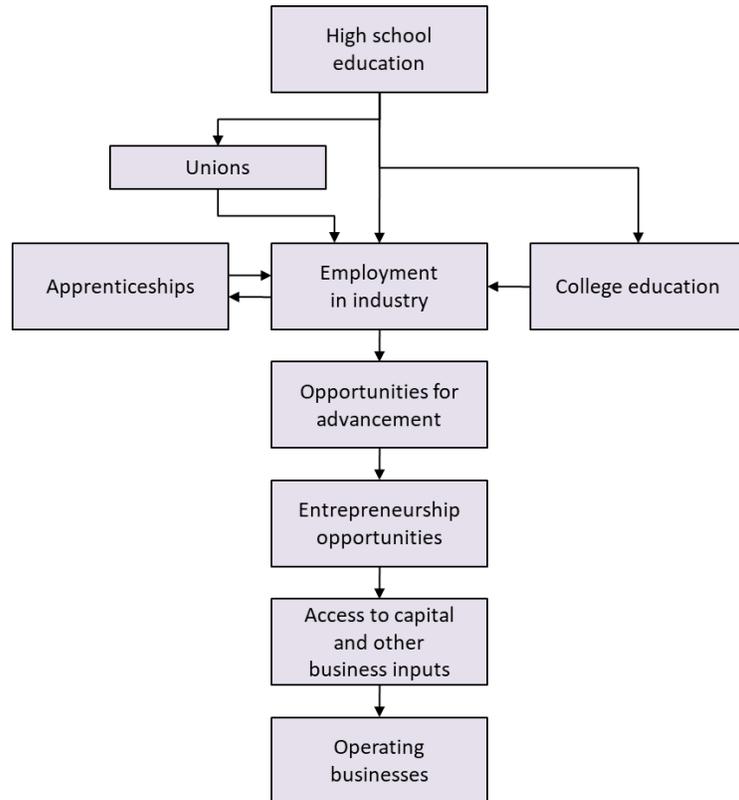
³ Several other report appendices analyze other quantitative aspects of conditions in the Colorado marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Appendix E uses 2014–2018 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals gain the work experience and qualifications to start businesses in the study industries. Because the ACS does not collect information on sexual orientation or gender identity, these data cannot be used to evaluate employment conditions for LGBT individuals.

All results pertain to conditions before the COVID-19 pandemic.

Figure E-1.
Model for studying entry
into study industries in
Colorado

Source:
Keen Independent Research.



Keen Independent began the analysis by examining the representation of people of color, women, persons with disabilities and LGBT individuals among business owners and workers in Colorado.

People of color among workers and business owners in Colorado. Figure E-2 shows the demographic distribution of business owners in the study industries, business owners in other industries (excluding the study industries) and workers in the labor force, based on 2014–2018 ACS data. (Demographics of the workforce in each individual study industry are presented separately later in Appendix E.) Analysis of Colorado in 2014–2018 indicated the following:

- African Americans were 4 percent of the workforce and 3 percent of business owners in the study industries.
- Asian Americans accounted 4 percent of all workers and about 2 percent of business owners in study industries.

- Hispanic Americans were 19 percent of the entire workforce and 14 percent of business owners in the study industries.
- Native Americans accounted for approximately 1 percent of the workforce and business owners in the study industries.
- Non-Hispanic whites accounted for about 81 percent of business owners in the study industries and 82 percent of business owners in other industries, higher than their representation in the workforce (71%).

Figure E-2.

Demographic distribution of business owners and the workforce in Colorado, 2014–2018

Colorado	Workforce in all industries	Business owners in study industries	Business owners in all other industries
Race/ethnicity			
African American	4.4 %	2.7 % **	2.0 % **
Asian American	3.8	1.6 **	4.1
Hispanic American	19.3	13.9 **	10.7 **
Native American or other minority	1.4	1.0 **	1.1
Non-Hispanic white	71.1	80.8 **	82.1 **
Total	100.0 %	100.0 %	100.0 %
Gender			
Female	46.0 %	27.5 % **	51.2 % **
Male	54.0	72.5 **	48.8 **
Total	100.0 %	100.0 %	100.0 %
Disability			
Persons with disabilities	5.9 %	7.1 % **	7.1 % **
All others	94.1	92.9 **	92.9 **
Total	100.0 %	100.0 %	100.0 %

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

“All other industries” includes all industries other than the construction, construction-related professional services, other professional services, goods, other services and brokerage and investment industries.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata Sample (PUMS). The 2014–2018 raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Keen Independent analyzed whether differences between the representation of each group among business owners and the representation of that group in the workforce were statistically significant, which means that sampling in the Census data can be rejected as a cause of the observed differences (noted with asterisks in Figure E-2). Each of the differences described above were statistically significant.

Female workers and business owners in Colorado. Figure E-2 also examines the percentage of Colorado business owners and workers who are women. In 2014–2018, women accounted for about 28 percent of business owners in the study industries, considerably less than representation in the overall workforce (46%).

Persons with disabilities in the workforce and as business owners in Colorado. The last section of Figure E-2 presents the percentage of Colorado business owners and workers who are persons with physical or mental disabilities. In 2014–2018, persons with disabilities accounted for about 7 percent of business owners in study industries, slightly higher than the representation of those individuals in the total workforce (6%).

LGBT individuals in the workforce and as business owners in Colorado. Although the ACS does not include data sexual orientation or gender identity, analysis using Gallup Poll data indicate that in 2015–2017 about 5 percent of the population in Colorado identified as LGBT.^{4, 5} Employment data by industry are not available.

Academic research has investigated employment discrimination and its effect on opportunities for the LGBT community in Colorado. For many years in Colorado it has been illegal to discriminate on the basis of sexual orientation or gender identity or expression in employment.⁶ Despite legal protection, a Colorado-based study found evidence of anti-LGBT discrimination in the workplace, especially among minorities in the LGBT community.⁷ In a 2010 Colorado survey of LGBT individuals age 18 and older, 27 percent of lesbian and gay respondents reported that they had experienced employment discrimination. In the same survey, more than one-half (52%) of transgender respondents reported experiencing discrimination in the workplace. Additionally, about one-third of those surveyed indicated being unfamiliar with legal protections against employment discrimination.⁸

A national literature review of LGBT discrimination studies between 1998 and 2008 reports the ubiquity of discrimination based on sexual orientation and gender identity.⁹ This review reports that 16 to 68 percent of LGBT respondents report experiencing some employment discrimination at some point in their lives.

⁴ The Gallup survey asks, “Do you, personally, identify as lesbian, gay, bisexual, or transgender?” All individuals who responded “Yes” were considered part of the LGBT community.

⁵ LGBT Demographic Data Interactive. (2019, January). Los Angeles, CA: The Williams Institute, UCLA School of Law. Retrieved from <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=8#about-the-data>

⁶ Pizer, J. C., Sears, B., Mallory, C., & Hunter, N. D. (2012). Evidence of persistent and pervasive workplace discrimination against LGBT people: The need for federal legislation prohibiting discrimination and providing for equal employment benefits. *Loyola Law Review Los Angeles*, 45(3). Retrieved from <https://escholarship.org/content/qt3wf4t3q9/qt3wf4t3q9.pdf>

⁷ Whitfield, D. L., Walls, N. E., Langenderfer-Magruder, L., & Clark, B. (2014). Queer is the new black? Not so much: Racial disparities in anti-LGBTQ discrimination. *Journal of Gay & Lesbian Social Services*, 26(4), 426-440. doi:10.1080/10538720.2014.955556

⁸ One Colorado Education Fund. (2010). *A Conversation with Coloradans* (Rep.). Denver, Colorado.

⁹ Badgett, M. V. (2009). Bias in the workplace: Consistent evidence of sexual orientation and gender identity discrimination 1998-2008. *Chi.-Kent L. Rev.*, 84(2), 559.

Members of the LGBT community face employment discrimination as income inequality,¹⁰ increased likelihood of job loss and denial of opportunity for advancement.¹¹ One study reported that the fear of disclosing one's sexual orientation or gender identity in a hostile work environment negatively impacts one's career advancement.¹² National studies have also found that discrimination based on sexual orientation and gender identity is especially prevalent in the building trades.^{13, 14}

There is also evidence that anti-LGBT cases of discrimination may be underreported. A Colorado study found that, of those in the LGBT community that reported experiencing employment discrimination:

- Over 70 percent did not report the experience;
- Approximately 22 percent reported the experience to the employer (e.g., human resources or a manager);
- Some reported the experience to an attorney (7%), a school official (3%) or the police (1%); and
- About 3 percent that experienced workplace discrimination reported the experience to the Colorado Civil Rights Commission.¹⁵

If anti-LGBT workplace discrimination impacts opportunities for initial hiring and then advancement in a particular industry, business ownership for LGBT individuals may be affected in these industries.

Due to limitations in the ACS data discussed above, the balance of Appendix E focuses on employment of people of color, women and persons with disabilities, beginning with conditions in the Colorado construction industry.

¹⁰ Factor, R. J., & Rothblum, E. D. (2007). A study of transgender adults and their non-transgender siblings on demographic characteristics, social support, and experiences of violence. *Journal of LGBT Health Research*, 3(3), 11-30.

¹¹ Lombardi, E. L., Wilchins, R. A., Priesing, D., & Malouf, D. (2002). Gender violence: Transgender experiences with violence and discrimination. *Journal of Homosexuality*, 42(1), 89-101.

¹² Ragins, B. R., Singh, R., & Cornwell, J. M. (2007). Making the invisible visible: Fear and disclosure of sexual orientation at work. *Journal of Applied Psychology*, 92(4), 1103.

¹³ Denissen, A. M., & Saguy, A. C. (2014). Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society*, 28(3), 381-403.

¹⁴ Frank, M. (2001, April). Hard hats & homophobia: Lesbians in the building trades. *New Labor Forum*, 8(3), 25-36.

¹⁵ Ibid.

B. Construction Industry

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that people of color, women and persons with disabilities owned in the Colorado construction industry in 2014–2018.

Education. Formal education beyond high school is not a prerequisite for most construction jobs,¹⁶ and the construction industry often attracts individuals who have relatively less formal education than in other industries.¹⁷ Based on 2014–2018 ACS data, 33 percent of construction workers in Colorado were high school graduates without post-secondary education and 20 percent had not graduated high school. Only 16 percent of construction workers had a four-year college degree or more, less than what is found for all other industries combined (42%).

Race/ethnicity. Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in the state, one would expect a relatively high representation of those groups in the Colorado construction industry, especially in entry-level positions.

- Hispanic Americans represented a large population of workers without post-secondary education. In 2014–2018, only 18 percent of all Hispanic American workers age 25 and older who worked in Colorado held at least a four-year college degree, far below the figure for non-Hispanic whites 25 and older (51%).
- Of Colorado workers age 25 and older, the percentage of African Americans (32%) and Native Americans (33%) with a four-year college degree was also substantially lower than that of non-minorities in 2014–2018.

However, in 2014–2018 almost 58 percent of Asian American workers age 25 and older in Colorado had at least a four-year college degree. One might expect representation of Asian Americans in the Colorado construction industry to be lower than in other industries given this level of education.

Gender. According to 2014–2018 Colorado data, 47 percent of female workers and 42 percent of male workers age 25 and older had at least a four-year college degree. This might contribute to lower representation of women among construction workers.

¹⁶ Bureau of Labor Statistics, U.S. Department of Labor. (2018, January 30). Construction and extraction occupations. *Occupational Outlook Handbook*. Retrieved from <https://www.bls.gov/ooh/construction-and-extraction/home.htm>

¹⁷ CPWR - The Center for Construction Research and Training. (2013). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (5th ed.). Retrieved from <https://www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf>;

CPWR - The Center for Construction Research and Training. (2007). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (3rd ed.). Retrieved from https://www.cpwr.com/sites/default/files/research/CB3_FINAL.pdf

Among people with a college degree, women have been less likely to enroll in construction-related degree programs. Nationally, women have low levels of enrollment in Construction Management programs, and this may be due to (a) the prevailing notion that construction is an industry dominated by males and is unkind to females and families, and (b) secondary school career counselors' lack of discussion of women's career opportunities in the construction fields, and female students' consequent lack of knowledge of these professions.¹⁸

Persons with disabilities. Data from 2014–2018 indicate that about 31 percent of Colorado workers with disabilities age 25 and older had at least a four-year college degree. Of all others age 25 and older, over 45 percent had at least a four-year college degree.

Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.¹⁹ In response to limited construction employment opportunities during the Great Recession, apprenticeship programs limited the number of new apprenticeships²⁰ as well as access to knowing when and where apprenticeships occur.²¹ Apprenticeship programs often refer to an “out-of-work list” when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, some research indicates that apprentices are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.²²

¹⁸ Sewalk, S., & Nietfeld, K. (2013). Barriers preventing women from enrolling in construction management programs. *International Journal of Construction Education and Research*, 9(4), 239-255. doi:10.1080/15578771.2013.764362

¹⁹ Bureau of Labor Statistics, U.S. Department of Labor. (2013). Apprenticeship: Earn while you learn. Retrieved from <https://www.bls.gov/careeroutlook/2013/summer/art01.pdf>

²⁰ Kelly, M., Pisciotta, M., Wilkinson, L., & Williams, L. S. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

²¹ Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

²² Ibid.

Employment. With educational attainment for minorities, women, persons with disabilities and others as context, Keen Independent examined employment in the Colorado construction industry. Figure E-3 presents data from 2014–2018 to compare the demographic composition of the construction industry with the total workforce in Colorado.

Race/ethnicity. Based on 2014–2018 ACS data, people of color were 40 percent of those working in the Colorado construction industry. Examination of the Colorado construction industry workforce in 2014–2018 shows that:

- Almost 36 percent were Hispanic Americans;
- About 2 percent were African Americans;
- Approximately 1 percent were Native Americans; and
- Asian Americans made up about 1 percent.

In Colorado, Hispanic Americans were a significantly larger percentage of workers in construction (36%) than in other industries (18%). Both African Americans (2%) and Asian Americans (1%) accounted for a smaller percentage of workers in the construction industry than in other industries (5% and 4%, respectively). Figure E-3 presents these results.

The average educational attainment of African American workers is consistent with requirements for construction jobs, so education does not explain the relatively low number of these groups employed in the Colorado construction industry. Historically, race discrimination by construction unions has contributed to the low employment of African Americans in construction trades.²³ The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

Asian Americans made up 1 percent of the construction workforce and 4 percent of all other workers in Colorado in 2014–2018. The fact that Asian Americans were more likely than other groups to have a college education may explain part of that difference.

Gender. There are significant differences between the representation of women in the construction workforce and their representation in all other industries. For the years 2014–2018, in Colorado women represented 10 percent of all construction workers and 49 percent of workers in all other industries in Colorado.

Persons with disabilities. In 2014–2018, persons with disabilities represented a similar portion of construction workers (6%) and workers in all other industries (6%) in Colorado.

²³ Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l; Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302; *United Steelworkers v. Weber*, 443 U.S. 193 (5th Cir. 1979).

Figure E-3.
Demographics of workers in construction and all other industries
in Colorado, 2014–2018

Colorado	Construction	All other industries
Race/ethnicity		
African American	1.8 % **	4.7 %
Asian American	1.0 **	4.1
Hispanic American	35.7 **	17.9
Native American or other minority	1.3	1.4
Total minority	39.7 %	28.0 %
Non-Hispanic white	60.3 **	72.0
Total	100.0 %	100.0 %
Gender		
Female	10.4 % **	49.1 %
Male	89.6 **	50.9
Total	100.0 %	100.0 %
Disability		
Persons with disabilities	5.8 %	5.9 %
All others	94.2	94.1
Total	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in the construction industry and all other industries for the given Census/ACS year is statistically significant at the 95% confidence level, respectively.

“All other industries” includes all industries other than the construction industry.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Academic research concerning any effect of race- and gender-based discrimination in construction labor markets. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for people of color and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affect opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.²⁴ One recent study found that when African American women in construction advance into leadership roles, they often find that others unduly challenge their authority. Study participants also reported incidents of harassment, bullying, and the assumption that they are inferior to their male peers; these instances are believed to hinder African American females’ career development and overall success in the construction industry.²⁵ In another study, white men were found to be the least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new

²⁴ Denissen, A. M., & Saguy, A. C. (2013). Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society*, 28(3), 381-403. doi:10.1177/0891243213510781; Ericksen, J. A., & Schulteiss, D. E. (2009). Women pursuing careers in trades and construction. *Journal of Career Development*, 36(1), 68-89. doi:10.1177/0894845309340797

²⁵ Hunte, R. (2016). Black women and race and gender tensions in the trades. *Peace Review*, 28(4), 436-443. doi:10.1080/10402659.2016.1237087

skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.²⁶

Additionally, women encounter practical issues such as difficulty in accessing personal protective equipment that fits them properly (they frequently find such employer-provided equipment to be too large). This sometimes poses a safety hazard, and even more often hinders female workers' productivity, which can impact their relationships with supervisors as well as their opportunities for growth in the industry.²⁷

Research suggests that race and gender inequalities in a workplace are often evidenced through the acceptance of the “good old boys’ club” culture.²⁸ There may also be an attachment to the idea that “working hard” will bring success. However, the quantitative and qualitative evidence indicates that “hard work” alone does not ensure success for women and people of color.²⁹ In 2014, the National Women’s Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including explicit gender discrimination and harassment.³⁰

The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.³¹ Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering the industry.³²

²⁶ Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

²⁷ Onyebekwe, L. C., et al. (2016). Access to properly fitting personal protective equipment for female construction workers. *American Journal of Industrial Medicine*, 59(11), 1032-1040. doi:10.1002/ajim.22624

²⁸ Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in highway trades. *Eastern Sociological Society*, 30(2): 415–438.

²⁹ Ibid.

³⁰ Jackson, Sarah. (2019, Nov. 29). *Not the boys’ club anymore’: Eight women take a swing at the construction industry*. NBC News. Retrieved from <https://www.nbcnews.com/news/us-news/not-boys-club-anymore-eight-women-take-swing-construction-industry-n1091376>; Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women’s Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

³¹ Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

³² Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

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.³³ According to the Bureau of Labor Statistics, in 2019 union membership among people employed in construction occupations was over 17 percent.³⁴ National union membership within all occupations during 2019 was about 10 percent.³⁵ The difference in union membership rates demonstrates the importance of unions within the construction industry. In Colorado, union membership for all occupations during 2019 was about 9 percent,³⁶ although it is unclear what percentage of these workers worked in the construction industry.

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be a path 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.³⁷ Some researchers have argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.³⁸
- 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.³⁹

³³ Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

³⁴ Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 22). *Union affiliation of employed wage and salary workers by occupation and industry* [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.t03.htm>

³⁵ Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 22). *Union Members — 2019* [Press release]. Retrieved from <https://www.bls.gov/news.release/pdf/union2.pdf>

³⁶ Bureau of Labor Statistics, U.S. Department of Labor. (2020, January 31). *Union Members in Colorado — 2019* [Press release]. Retrieved from https://www.bls.gov/regions/mountain-plains/news-release/unionmembership_colorado.htm

³⁷ U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

³⁸ *Ibid.*; *U.S. v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir. 1971); *Sims v. Sheet Metal Workers International Association*, 489 F.2d 1023 (6th Cir. 1973); *U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers*, 438 F.2d 679 (7th Cir. 1971).

³⁹ Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.⁴⁰
- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.⁴¹
- 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.⁴²
- 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.⁴³

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs.

Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.⁴⁴

⁴⁰ Ibid. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

⁴¹ Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

⁴² U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

⁴³ Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

⁴⁴ Glover, R. W., & Bilginsoy, C. (2005). Registered apprenticeship training in the U.S. construction industry. *Education + Training*, 47(4/5), 337-349. doi:10.1108/00400910510601913

- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.⁴⁵
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.⁴⁶ 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, 2018 Current Population Survey (CPS) asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed that union membership was highest among African Americans (13%), and non-Hispanic whites (10%). Hispanic American workers (9%) and Asian American workers (8%) had relatively lower rates of union membership.⁴⁷ Recent research utilizing ACS data puts African American union membership in the construction industry at over 17 percent.⁴⁸

According to some research, union apprenticeships appear to have drawn more African Americans into the construction trades in some markets,⁴⁹ and studies have found a high percentage of minority construction apprentices. In 2010 in New York City, for example, approximately 69 percent of first-year local construction apprentices were African American, Hispanic American, Asian American, or members of other minority groups. In addition, 11 percent of local New York City construction apprentices were women. It should be noted that, though the Building and Construction Trades Council of Greater New York set a goal that women represent 10 percent of local apprentices; the City did not establish a goal for minority participation.⁵⁰ However, this increase in apprenticeships may not necessarily be indicative of improved future prospects for minority workers. A study in Oregon found that, though minority men’s participation in construction

⁴⁵ Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: Women training for the construction trades in the USA. *International Journal of Manpower*, 27(4), 321-341. doi:10.1108/01437720610679197

⁴⁶ Bilginsoy, C. (2005). How unions affect minority representation in building trades apprenticeship programs. *Journal of Labor Research*, 26(3), 451-463. doi:10.1007/s12122-005-1014-4

⁴⁷ Bureau of Labor Statistics, U.S. Department of Labor. (2019, January 18). *Union Members Summary* [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.nr0.htm>

⁴⁸ Bucknor, C. (2016). *Black workers, unions, and inequality*. Washington D.C.: Center for Economic and Policy Research.

⁴⁹ Mishel, L. (2017). *Diversity in the New York City union and nonunion construction sectors* (Rep.). Retrieved from Economic Policy Institute website: <http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/>

⁵⁰ Figueroa, M., Grabelsky, J., & Lamare, J. R. (2013). Community workforce agreements: A tool to grow the union market and to expand access to lifetime careers in the unionized building trades. *Labor Studies Journal*, 38(1), 7-31. doi:10.1177/0160449x13490408

apprenticeships was roughly proportional to their representation in the state’s workforce, their representation in skilled trades apprenticeships was lower than might be expected.⁵¹

Construction labor shortages in recent years in Colorado⁵² have also made it difficult for firms to find new hires,⁵³ prompting unions to look to minorities and women as way to fill the need for new employees.⁵⁴ Union chapters in Colorado, and throughout the country, have also developed diversity and inclusion programs to increase the number of workers from underrepresented groups. This has been done through initiatives such as targeted recruiting campaigns⁵⁵ and education and mentor programs.⁵⁶ After receiving a \$1.8 million grant from the United States Department of Labor (USDOL) in 2016, the State of Colorado has also worked to expand and improve apprenticeships in the state and assist apprenticeship providers in reaching out to previously underrepresented groups like minorities, women and persons with disabilities.⁵⁷

Although union membership and union program participation vary based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on African American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Colorado are different from other parts of the country. In addition, current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through “insourcing” and active recruitment into apprenticeship programs.^{58, 59}

⁵¹ Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and racial training gaps in Oregon apprenticeship programs. *Labor Studies Journal*, 36(2), 221-244. doi:10.1177/0160449x10396377

⁵² (2017). 2017 CAMPC, NECA, and SMACNA Colorado Construction Industry Economic Impact Study. Retrieved from: https://rmmca.org/wp-content/uploads/2013/11/2017_EconomicImpactStudy-Final.pdf

⁵³ The Associated General Contractors of America (AGC). (2018). *The Workforce Development Plan 2.0: AGC of America’s New Plan to Address Growing Construction Workforce Shortages*. Retrieved from https://www.agc.org/sites/default/files/Files/Communications/Workforce_Development_Plan_2.0_FINAL.pdf

⁵⁴ Hatcher, M. (2019). Construction Trade Association Urges Minorities and Women to Join Construction Trades. *The National Law Review*, IX (80), Retrieved from <https://www.natlawreview.com/article/construction-trade-association-urges-minorities-and-women-to-join-construction>

⁵⁵ Ibid.

⁵⁶ Associated General Contractors. (2020). Diversity Committee. Retrieved from: <http://www.agccolorado.org/diversity-committee>

⁵⁷ Postolowski, C., & Steva E., (2018). Achieving Gender Equity in Colorado Apprenticeships. Retrieved from https://younginvincibles.org/wp-content/uploads/2018/10/YI_CO_AchievingGenderEquityinApprenticeships.pdf

⁵⁸ Judd, R. (2016, November 30). Seattle’s building boom is good news for a new generation of workers. *The Seattle Times, Pacific NW Magazine*. Retrieved from <https://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-news-for-a-new-generation-of-workers/>

⁵⁹ For example, Boston’s “Building Pathways” apprenticeship program is designed to recruit workers from low-income underserved communities. <https://buildingpathwaysboston.org/>

Advancement. To research opportunities for advancement in the Colorado construction industry, Keen Independent examined the representation of people of color and women in construction occupations (defined by the U.S. Bureau of Labor Statistics⁶⁰). Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2014–2018 ACS for analysis.

Racial/ethnic composition of construction occupations. Figure E-4 presents the race/ethnicity of workers in select construction-related occupations in Colorado, including lower-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., welding, soldering and brazing workers), and supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-4 presents those data for 2014–2018.

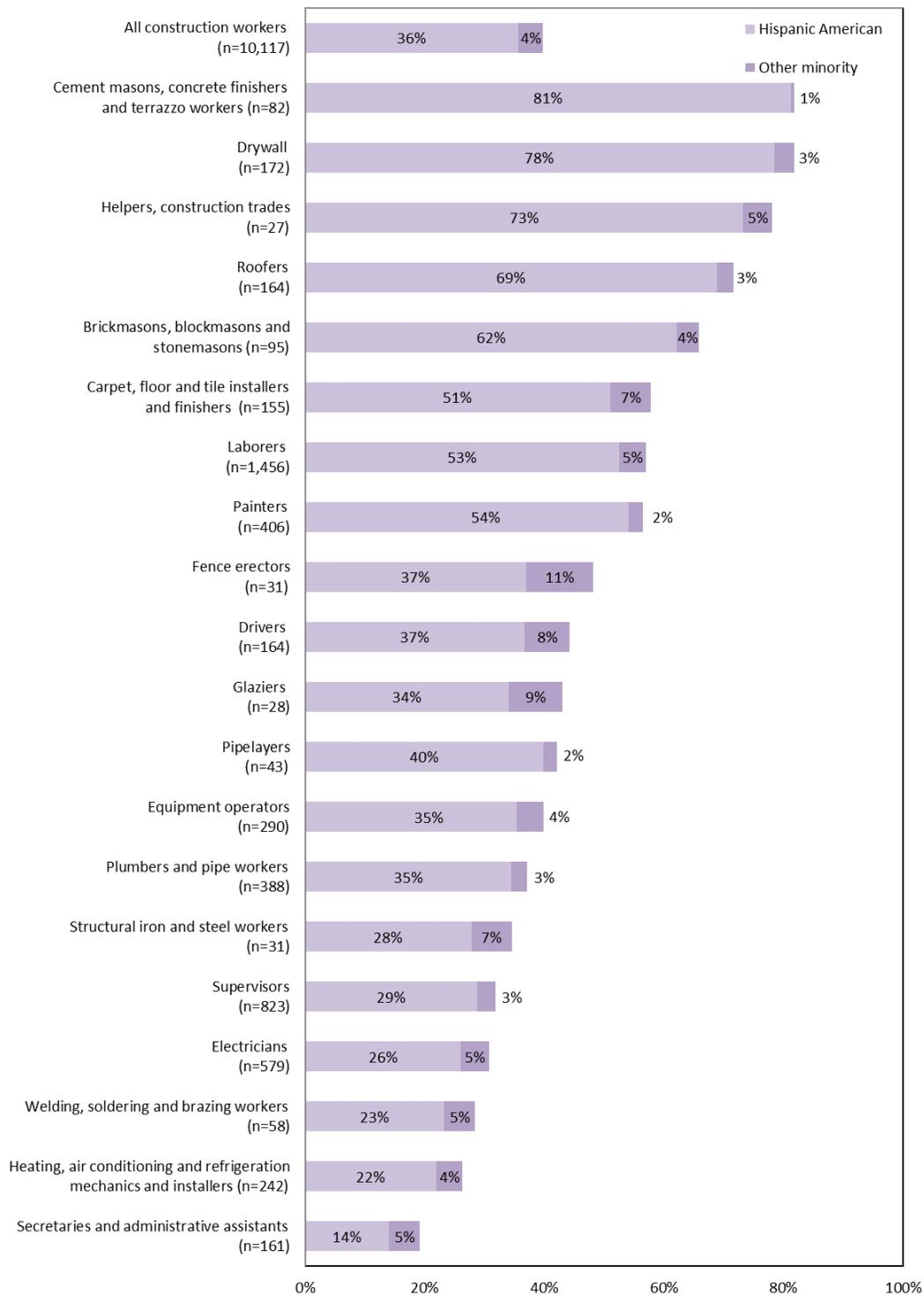
Based on 2014–2018 ACS data, there are large differences in the racial and ethnic makeup of workers in various construction trades in Colorado. Overall, people of color comprised 40 percent of construction workers, as shown in Figure E-4. Most minorities working in the state construction industry in 2014–2018 were Hispanic Americans. When compared with the representation of Hispanic Americans among all construction workers (36%), the representation of Hispanic Americans was substantially greater in occupations including:

- Cement masons, concrete finishers and terrazzo workers (81%);
- Drywallers (78%);
- Helpers of construction trades (73%);
- Roofers (69%);
- Brickmasons, blockmasons and stonemasons (62%);
- Painters (54%);
- Laborers (53%); and
- Carpet, floor and tile installers and finishers (51%).

However, among first-line supervisors in the Colorado construction industry, only 29 percent were Hispanic Americans and 3 percent were other minorities.

⁶⁰ Bureau of Labor Statistics, U.S. Department of Labor. (2001). Standard occupational classification major groups. Retrieved from http://www.bls.gov/soc/major_groups.htm

Figure E-4.
 Minorities as a percentage of selected construction occupations in Colorado, 2014–2018



Note: Other minority includes African Americans, Asian American and Native Americans and other minorities.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

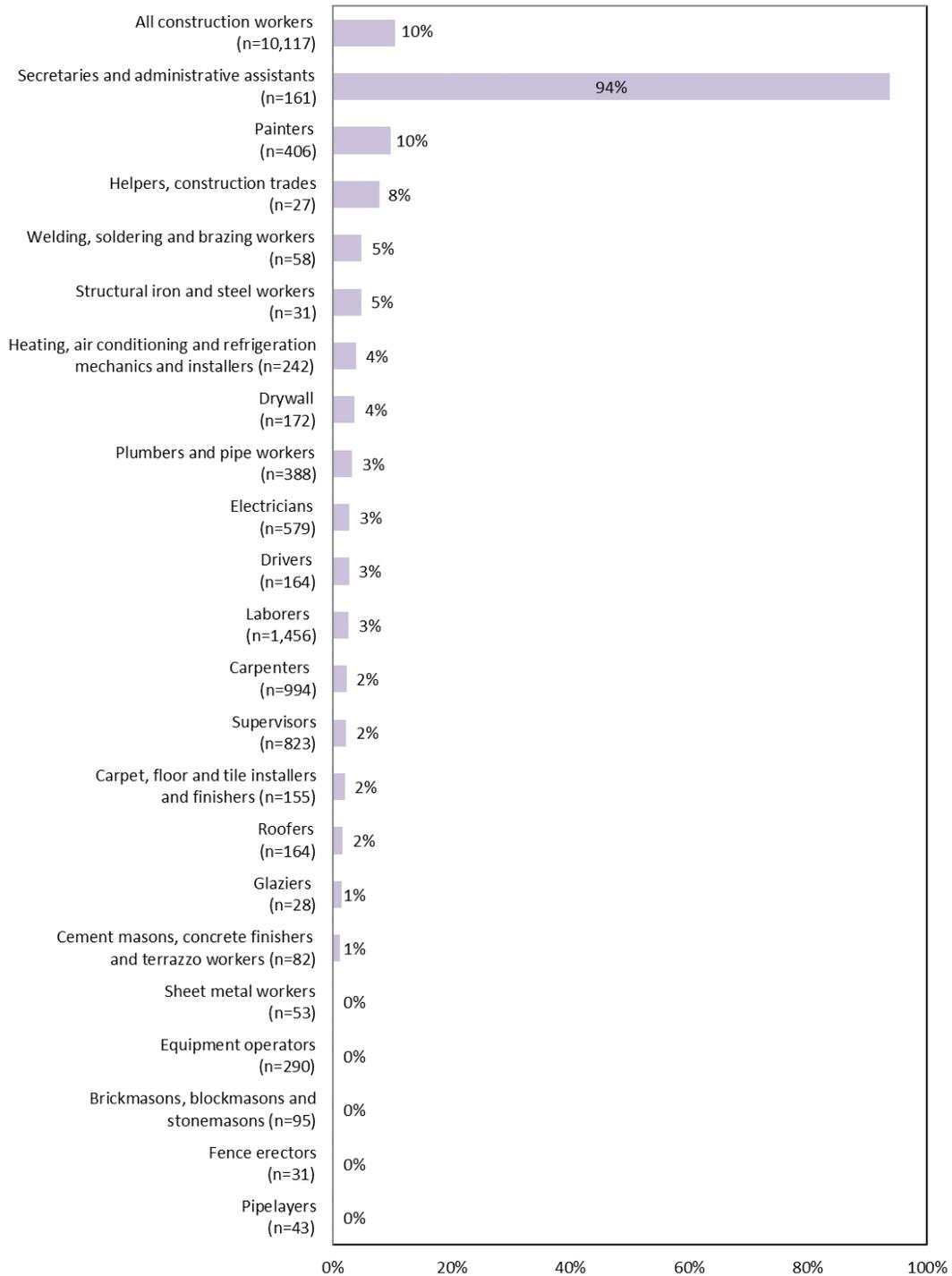
Gender composition of construction occupations. Keen Independent also analyzed the proportion of women in construction-related occupations. Figure E-5 summarizes the representation of women in select construction-related occupations for 2014–2018. (Overall, women made up only 10 percent of workers in the industry in 2014–2018, which includes office workers in the industry.)

In 2014–2018, women accounted for no more than 5 percent of the workers in most of the largest construction trades. Women represented less than 1 percent of those working as:

- Sheet metal workers;
- Equipment operators;
- Brickmasons, block mason and stonemasons;
- Fence erectors; and
- Pipelayers.

As shown in Figures E-5, women comprised just 2 percent of first-line supervisors in 2014–2018.

Figure E-5.
 Women as a percentage of construction workers in selected occupations in Colorado, 2014–2018



Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Percentage of minorities as managers. To further assess advancement opportunities in the Colorado construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-6 presents the percentage of construction employees who reported working as managers in 2014–2018 for Colorado by racial/ethnic and gender group, as well as by disability status.

In 2014–2018, about 12 percent of non-Hispanic whites in the Colorado construction industry were managers. Relatively fewer African Americans (3%), Asian Americans (6%), Hispanic Americans (2%) and Native Americans (3%) in the industry worked as managers, statistically significant differences from the rate for non-Hispanic whites.

Percentage of women as managers. In the Colorado construction industry, there was a statistically significant difference in the percentage of female and male workers who were managers in 2014–2018 (see Figure E-6). About 6 percent of female construction workers were managers, less than the 9 percent of male construction workers who were managers in 2014–2018.

National research suggests that this is not due to managerial competency differences between males and females. One study found that women construction managers were rated similarly to their male counterparts in terms of various managerial capabilities and performed better than male managers in terms of sensitivity, customer focus, and authority and presence.⁶¹

Percentage of persons with disabilities as managers. In 2014–2018 there was not a significant difference in the percentage of Colorado construction workers that worked as managers when comparing those with disabilities (9%) to all others (8%) in the industry. These results are also presented in Figure E-6.

⁶¹ Arditi, D., & Balci, G. (2009). Managerial competencies of female and male construction managers. *Journal of Construction Engineering and Management*, 135(11), 1275-1278. doi:10.1061/(asce)co.1943-7862.0000100

Figure E-6.
 Percentage of construction workers who worked as a
 manager in 2014–2018 in Colorado

Colorado	2014–2018
Race/ethnicity	
African American	3.3 % **
Asian American	5.8 *
Hispanic American	2.1 **
Native American or other minority	2.8 **
Non-Hispanic white	12.1
Gender	
Female	6.2 % **
Male	8.5
Disability	
Persons with disabilities	8.9 %
All others	8.2
All individuals	8.2

Note: *, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or between females and males or persons with disabilities and all others) for the given Census/ACS year is statistically significant at the 90% and the 95% confidence level, respectively.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

C. Construction-Related Professional Services and Other Professional Services Industries

Keen Independent also examined how education and employment may influence the number of workers, and therefore potential entrepreneurs who were minorities, women and persons with disabilities, in both the local construction-related professional services industry and other professional services industry.

Education. Unlike the construction industry, lack of relevant education may preclude workers' entry into jobs in construction-related professional services and other professional services. Many professional services occupations require at least a four-year college degree and some require licensure.

- According to the 2014–2018 ACS, 74 percent of individuals working in the Colorado construction-related professional services industry had at least a four-year college degree and 7 percent had an associate's degree. (About 92 percent of civil engineers age 25 years and older had at least a four-year college degree.)
- Of those working in other professional services in Colorado, 72 percent had at least a four-year college degree and 6 percent had an associate's degree.

Therefore, any barriers to college education can restrict employment opportunities, advancement opportunities, and, consequently, business ownership in the construction-related and other professional services industries. Low numbers of business owners in professional services business owners may in part reflect the lack of higher education for particular racial, ethnic and gender groups, or differences in education across persons with disabilities and all others.⁶² Keen Independent explores this issue below.

Race/ethnicity. Figure E-7 presents the percentage of workers age 25 and older with at least a four-year college degree in Colorado. About 51 percent of all nonminority workers age 25 and older had at least a four-year degree in 2014–2018. For Colorado workers 25 years and older in other racial/ethnic groups, the data indicated the following:

- Less than one-third of African Americans had at least a four-year college degree;
- Only 18 percent of Hispanic Americans had at least a four-year degree; and
- About 36 percent of Native Americans had a four-year degree or more.

However, this percentage was 58 percent for Asian Americans.

The level of education necessary to work in the professional services industries may affect employment opportunities for groups for which college education lags that of non-Hispanic whites.

Gender. Figure E-7 also presents the results by gender group. According to 2014–2018 data, in Colorado relatively more female workers age 25 and older had at least a four-year college degree (47%) than their male counterparts (42%).

Persons with disabilities. Of Colorado workers age 25 and older, 31 percent of those with disabilities had at least a four-year degree, while 45 percent of all others had at least a four-year degree (see Figure E-7).

⁶² Dickson, P. H., Solomon, G. T., & Weaver, K. M. (2008). Entrepreneurial selection and success: Does education matter? *Journal of Small Business and Enterprise Development*, 15(2), 239-258. doi:10.1108/14626000810871655; Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x02721; Macionis, J. J. (2018). *Sociology* (16th ed.). Harlow, England: Pearson.

Figure E-7.
 Percentage of all workers 25 and older with at least a
 four-year college degree in Colorado, 2014–2018

Colorado	2014–2018
Race/ethnicity	
African American	31.6 % **
Asian American	57.7 **
Hispanic American	18.1 **
Native American or other minority	35.5 **
Non-Hispanic white	50.8
Gender	
Female	47.3 % **
Male	41.6
Disability	
Persons with disabilities	30.8 % **
All others	45.0
All individuals	44.2

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or between females and males or persons with disabilities and all others) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Employment. Figure E-8 compares the demographic composition of Colorado construction-related professional services workers and other professional services workers to that of workers in all other industries who are 25 years or older and have a college degree.

Construction-related professional services. In 2014–2018, about 13 percent of workers in the Colorado construction-related professional services industry were people of color.

- African Americans and Native Americans made up a small portion of the industry (both about 1%);
- About 4 percent were Asian Americans; and
- Approximately 7 percent were Hispanic Americans.

The representation of African Americans and Asian Americans in the Colorado construction-related professional services industry is lower than their representation among workers age 25 and older with at least a four-year college degree in all other industries. These differences are statistically significant, as shown in Figure E-8.

Compared to their representation among workers 25 and older with a college degree in all other industries, fewer women work in the construction-related professional services industry. In 2014–2018, women represented about 29 percent of construction-related professional service workers in Colorado and 51 percent of workers with a four-year college degree in all other industries. This difference was statistically significant.

Persons with disabilities represented a similar portion of the construction-related professional services industry (4%) and all other workers age 25 and older with at least a four-year degree (4%). These results are shown in Figure E-8.

Figure E-8.
Demographic distribution of professional service workers and workers age 25 and older with a four-year college degree in all other industries in Colorado, 2014–2018

Colorado	Construction-related professional services	Other professional services	All other industries
Race/ethnicity			
African American	1.3 % **	2.6 % **	3.2 %
Asian American	3.8 *	5.9 **	4.7
Hispanic American	7.3	7.6	7.9
Native American or other minority	1.0	1.0	1.1
Total minority	13.4 % **	17.0 %	16.9 %
Non-Hispanic white	86.6 **	83.0	83.1
Total	100.0 %	100.0 %	100.0 %
Gender			
Female	29.0 % **	42.8 % **	51.2 %
Male	71.0 **	57.2 **	48.8
Total	100.0 %	100.0 %	100.0 %
Disability			
Persons with disabilities	4.3 %	4.7 %	4.4 %
All others	95.7	95.3	95.6
Total	100.0 %	100.0 %	100.0 %

Note: **, * Denote that the difference in proportions between workers in the specified industry and all other industries for the given race definition and Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively. Only the civilian workforce is included in workforce calculations.
“All other industries” includes all industries other than the construction-related professional services and the professional services industries.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

When Keen Independent examined the representation of people of color and women among specific occupations such as civil engineers, the pattern of underrepresentation of people of color and women persisted. For example, only 18 percent of civil engineers in Colorado were women in 2014–2018, substantially less than the representation of women among workers with college degrees in other industries (49%).

Many studies have examined the factors that contribute to low minority and female participation in the STEM fields.⁶³ Some factors that may play a role include isolation within work environments,⁶⁴ negative bias toward females in the engineering fields,⁶⁵ the perception that STEM fields are non-communal,⁶⁶ low anticipated power in male-dominated domains such as the STEM fields,⁶⁷ and inadequate secondary-school preparation for college-level STEM courses.⁶⁸

Researchers have also found that some minority groups, including African Americans, Hispanic Americans and Native Americans, continue to have disproportionately low representation among recipients of science and engineering bachelor's degrees and science and engineering doctorate degrees. The study found that those same groups were disproportionately underrepresented among employees in science and engineering occupations.⁶⁹

This is also reflected in demographics of the graduates from undergraduate engineering programs at the Colorado School of Mines, Colorado State University, University of Colorado Boulder and the University of Denver. Hispanic Americans comprised about 9 percent of students receiving undergraduate engineering degrees at these institutions (except 15 percent at DU) and other people of color generally represented smaller portions of graduating classes.⁷⁰

⁶³ See, e.g., Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109

⁶⁴ Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039; Wagner, S. H. (2017). Perceptions of support for diversity and turnover intentions of managers with solo-minority status. *Journal of Organizational Psychology*, 17(5), 28-36. Retrieved from http://www.na-businesspress.com/JOP/WagnerSH_17_5_.pdf

⁶⁵ Banchevsky, S., Westfall, J., Park, B., & Judd, C. M. (2016). But you don't look like a scientist! Women scientists with feminine appearance are deemed less likely to be scientists. *Sex Roles*, 75(3/4), 95-109. doi:10.1007/s11199-016-0586-1; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109; Reuben, E., Sapienza, P., & Zingales, L. (2014). How stereotypes impair women's careers in science. *Proceedings of the National Academy of Sciences*, 111(12), 4403-4408. doi:10.1073/pnas.1314788111

⁶⁶ Stout, J. G., Grunberg, V. A., & Ito, T. A. (2016). Gender roles and stereotypes about science careers help explain women and men's science pursuits. *Sex Roles*, 75(9/10), 490-499. doi:10.1007/s11199-016-0647-5

⁶⁷ Chen, J. M., & Moons, W. G. (2014). They won't listen to me: Anticipated power and women's disinterest in male-dominated domains. *Group Processes & Intergroup Relations*, 18(1), 116-128. doi:10.1177/1368430214550340

⁶⁸ Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039

⁶⁹ National Center for Science and Engineering Statistics. (2017, January 31). NCSSES publishes latest Women, Minorities, and Persons with Disabilities in Science and Engineering report. *National Science Foundation: Where Discoveries Begin*. Retrieved from https://www.nsf.gov/news/news_summ.jsp?cntn_id=190946

⁷⁰ American Society for Engineering Education. (2018). Publications. *College Profiles*. Retrieved from <http://profiles.asee.org/>

Other professional services. The disparity study also included certain other professional services in Colorado. Figure E-8 presents the demographics of these workers as well.

In Colorado in 2014–2018, people of color were about 17 percent of other professional service workers, which was similar to other industries in the state among people with a college degree. The share of workers who were African Americans was lower than what might be expected based on data on people with a college degree, and the percentage of workers who were Asian Americans were somewhat higher (these differences were statistically significant).

Women were underrepresented in the 2014–2018 Colorado other professional services industry. Although 51 percent of other workers in Colorado age 25 and older with at least a four-year degree were women, only 43 percent of other professional service workers were women. This difference was statistically significant.

Persons with disabilities made up a similar portion of other professional service workers (5%) and all other workers age 25 and older with at least a four-year college degree (4%).

D. Goods Industry

Keen Independent also examined how workforce composition may affect the number of potential business owners who were minorities, women and persons with disabilities in the goods industry.

For purposes of this study, the goods industry is comprised of businesses that sell materials, supplies and equipment to businesses and government agencies, and sometimes to the public as well. Chapter 3 of this report provides more information about the types of businesses examined in this industry.

Race/ethnicity. In 2014–2018, people of color were about 29 percent of the workforce in the Colorado goods industry, with Hispanic Americans comprising most of these workers. The demographic composition of workers in the industry was similar to the statewide workforce as a whole. These results are presented in Figure E-9.

Gender. Relatively few women worked in the Colorado goods industry compared to the statewide workforce. In 2014–2018, women represented about 28 percent of goods industry workers and 47 percent of workers in all other industries.

Persons with disabilities. The representation of persons with disabilities in the Colorado goods industry was similar to their representation in all other industries. In 2014–2018, persons with disabilities were about 6 percent of workers in both the goods industry and all other industries.

Figure E-9 compares the demographic composition of workers in the Colorado goods industry to that of workers in all other industries in the state.

Figure E-9.
Demographic distribution of workers in goods and all other industries in Colorado, 2014–2018

Colorado	Goods	All other industries
Race/ethnicity		
African American	4.0 %	4.5 %
Asian American	2.8 **	3.9
Hispanic American	21.4 **	19.2
Native American or other minority	1.2	1.4
Total minority	29.4 %	28.9 %
Non-Hispanic white	70.6	71.1
Total	100.0 %	100.0 %
Gender		
Female	27.9 % **	46.7 %
Male	72.1 **	53.3
Total	100.0 %	100.0 %
Disability		
Persons with disabilities	6.2 %	5.9 %
All others	93.8	94.1
Total	100.0 %	100.0 %

Note: ** Denote that the difference in proportions between workers in the goods industry and workers in all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

E. Other Services Industry

Keen Independent also examined the demographic composition of the Colorado other services industry workforce (see Figure E-10). Keen Independent defined the “other services” industry in this study as a wide range of sectors providing services other than professional services to businesses and government (and sometimes household consumers).

Race/ethnicity. People of color represented about 40 percent of the workforce in the Colorado other services industry in 2014–2018. Representation of the following groups exceeded the average for all workforce in the state: Of that workforce:

- Hispanic Americans (29%);
- African Americans (7%); and
- About 2 percent were Native Americans (2%).

Gender. About one-third of workers in the industry were women in 2014–2018, which is less than the representation of women in the overall workforce.

Persons with disabilities. In 2014–2018, about 8 percent of workers in the other services industry in Colorado were persons with disabilities, compared to 6 percent for all other industries.

Figure E-10 presents the demographic composition of workers in the Colorado other services industry and in all other Colorado industries.

Figure E-10.

Demographic distribution of workers in other services and all other industries in Colorado, 2014–2018

Colorado	Other services	All other industries
Race/ethnicity		
African American	7.3 % **	4.2 %
Asian American	2.5 **	3.9
Hispanic American	28.7 **	18.7
Native American or other minority	1.9 **	1.3
Total minority	40.4 % **	28.1 %
Non-Hispanic white	59.6 **	71.9
Total	100.0 %	100.0 %
Gender		
Female	35.4 % **	46.7 %
Male	64.6 **	53.3
Total	100.0 %	100.0 %
Disability		
Persons with disabilities	7.7 % **	5.8 %
All others	92.3 **	94.2
Total	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between workers in professional services and all other industries for the given Census/ACS year is statistically significant at 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

F. Brokerage and Investment Industry

Keen Independent also examined how workforce composition may affect the number of business owners who were minorities, women and persons with disabilities in the brokerage and investment industry. These results are presented in Figure E-11.

Race/ethnicity. In 2014–2018, people of color represented about 22 percent of the workforce in the Colorado brokerage and investment industry, relatively low due to underrepresentation of Hispanic American workers in the industry.

Gender. Compared to representation of women among workers in all other industries, relatively more women work in the brokerage and investment industry. In 2014–2018, women represented about 53 percent of brokerage and investment workers in Colorado, higher than the 46 percent found for other industries.

Persons with disabilities. Less than 4 percent of the brokerage and investment workforce was persons with disabilities in 2014–2018, which was below the representation in other industries in Colorado.

Figure E-11 compares the demographic composition of workers in the Colorado brokerage and investment industry to that of workers in all other industries in the state.

Figure E-11.
Demographic distribution of workers in brokerage and investment and all other industries in Colorado, 2014–2018

Colorado	Banking and investing	All other industries
Race/ethnicity		
African American	3.8 %	4.5 %
Asian American	4.4	3.8
Hispanic American	13.0 **	19.4
Native American or other minority	1.1	1.4
Total minority	<u>22.3 %</u> **	<u>29.1 %</u>
Non-Hispanic white	<u>77.7</u> **	<u>70.9</u>
Total	100.0 %	100.0 %
Gender		
Female	53.4 % **	45.8 %
Male	46.6 **	54.2
Total	100.0 %	100.0 %
Disability		
Persons with disabilities	3.6 % **	5.9 %
All others	96.4 **	94.1
Total	100.0 %	100.0 %

Note: ** Denote that the difference in proportions between workers in the goods industry and workers in all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Similar to the construction-related and other professional services industries, lack of college education may preclude workers' entry into the brokerage and investment industry. Several occupations require at least a four-year college degree and some require licensure. According to the 2014–2018 ACS, 60 percent of individuals working in the Colorado brokerage and investment industry had at least a four-year college degree and 6 percent had an associate's degree.

Therefore, barriers to college education discussed previously in this appendix can restrict employment and advancement opportunities in the brokerage and investment industry. This is especially evident for Hispanic Americans in Colorado.

ACS data for 2014–2018 indicate that among those working in the Colorado brokerage and investment industry, the most common field of bachelor's degree is finance. Keen Independent compiled data on recent graduates from the University of Colorado Boulder, University of Denver and Metropolitan State University of Denver. Relatively few individuals graduating from CU Boulder and DU with a finance degree were Hispanic Americans.^{71, 72} Hispanic Americans made up the highest share of finance graduates (18%).⁷³

G. Summary

People of color are 29 percent of the Colorado workforce and women are nearly one-half of all workers. Persons with disabilities are about 6 percent of the Colorado workforce.

- Analysis of the workforce of study industries, however, indicated that there could be barriers to employment for some minority groups and for women in certain industries. This was especially evident for African Americans and women in the construction industry. Disparities in the share of jobs held were also identified for persons with disabilities for some study industries.
- When Keen Independent analyzed the demographic characteristics of supervisory and managerial positions in the construction industry, disparities for people of color and women were also evident.
- About 5 percent of people in Colorado identify as LGBT. Although Census data were not available for LGBT workers, the literature indicates past discrimination in employment in Colorado for these individuals.

Any barriers to entry or advancement in the study industries might affect the relative number of businesses owned by people of color, women, LGBT individuals and persons with disabilities in these industries in Colorado. Appendix F, which follows, examines rates of business ownership among individuals working in the study industries.

⁷¹ University of Colorado Boulder IR – Profile (2019). CU Boulder degree counts by level, school/college, major and demographics from fiscal year 1989 to present. *By Major – Table*. Retrieved from https://public.tableau.com/profile/university.of.colorado.boulder.ir#!/vizhome/Degree_Counts/ByMajor-Table

⁷² University of Denver (2019). Institutional Research & Analysis. *Factbook - Degrees Awarded*. Retrieved from <https://www.du.edu/ir/factbook/degrees.html>

⁷³ Metropolitan State University of Denver (2018). Institutional Research. *Institutional Research Data Book – Graduates and Degrees*. Retrieved from <https://www.msudenver.edu/oir/institutionalresearchdatabook/graduatesanddegrees/>

APPENDIX F.

Business Ownership in the Colorado Marketplace

Keen Independent examined business ownership for different groups of workers in Colorado using Public Use Microdata Samples (PUMS) from the 2014–2018 American Community Survey (ACS). Keen Independent assessed whether the rates of business ownership within each industry differed for people of color, women and persons with disabilities compared with other workers in those industries.

As discussed in Appendix E, for this study Keen Independent considers the entire state of Colorado as the Colorado marketplace. Any discussion of the “Colorado marketplace” or “Colorado industries” in the following analysis includes firms and individuals located in these areas. Business owners include those who are “self-employed” and this appendix uses these terms interchangeably. All results pertain to conditions pre-COVID-19 pandemic.

A. Business Ownership Rates

Many studies have explored differences between minority and nonminority business ownership at the national level.¹ Although self-employment rates have increased for minorities and women over time, several studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.²

LGBT business owners. ACS data do not include information on sexual orientation or gender identity. Analysis done using Gallup Poll data, however, indicate that in 2015–2017 about 5 percent of the population in Colorado identified as LGBT.^{3, 4}

¹ See, e.g., Bates, T., & Robb, A.M. (2016). Impacts of owner race and geographic context on access to small-business financing. *Economic Development Quarterly*, 30(2), 159-170; Blanchflower, D. (2008). Minority self employment in the United States and the impact of Affirmative Action programs. *NBER Working Paper Series*, (13972); Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, 25(2), 289-323; Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics*, 32(3), 507-561.

² Lofstrom, M., Bates, T., & Parker, S. C. (2014). Why are some people more likely to become small-business owners than others: Entrepreneurship entry and industry-specific barriers. *Journal of Business Venturing*, 29(2), 232-251.

³ The Gallup survey asks, “Do you, personally, identify as lesbian, gay, bisexual, or transgender?” All individuals who responded “Yes” were considered part of the LGBT community.

⁴ LGBT Demographic Data Interactive. (2019, January). Los Angeles, CA: The Williams Institute, UCLA School of Law. Retrieved from <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=8#about-the-data>

A 2016 report published by the National Gay & Lesbian Chamber of Commerce estimated the total number of LGBT business owners in the U.S. to be 1.4 million.⁵ Estimates of business ownership rates at the state level and for specific industries are not available.

Because of data limitations, analyses done using ACS data do not differentiate LGBT individuals. The following industry-specific analyses include business ownership rates for minorities, women and persons with disabilities using ACS data for 2014–2018.

Construction industry. Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2014–2018, 22 percent of workers in the Colorado construction industry were self-employed, compared with about 10 percent of all workers in the state.

Figure F-1 shows that there are differences in the percentage of workers who were self-employed in the Colorado construction industry across groups.

- About 15 percent of Asian American workers in the construction industry in 2014 through 2018 were self-employed, less than the rate for non-Hispanic whites (28%). This difference was statistically significant.
- Hispanic American workers in the construction industry had business ownership rates less than half the rate for non-Hispanic whites in the industry, a statistically significant difference.
- Approximately 14 percent of Native Americans in the construction industry were self-employed, substantially less than the rate for non-Hispanic whites (a statistically significant difference).
- Over 28 percent of persons with disabilities in the construction industry were self-employed, more than the rate for those with no disabilities (a statistically significant difference).

⁵ National Gay & Lesbian Chamber of Commerce. (2016). *America's LGBT economy* (Rep.). Retrieved from National Gay & Lesbian Chamber of Commerce website: [http://nglcc.org/sites/default/files/\[REPORT\]%20NGLCC%20Americas%20LGBT%20Economy%20.pdf](http://nglcc.org/sites/default/files/[REPORT]%20NGLCC%20Americas%20LGBT%20Economy%20.pdf)

Figure F-1.
 Percentage of workers in the Colorado construction industry
 who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	22.3 %
Asian American	15.3 **
Hispanic American	13.3 **
Native American or other minority	14.0 **
Non-Hispanic white	28.1
Gender	
Female	21.1 %
Male	22.6
Disability	
Persons with disabilities	28.2 **
All others	22.1
All individuals	22.4 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Construction-related professional services industry. Figure F-2 presents the percentage of workers in the Colorado construction-related professional services industry who were self-employed. These results are also from ACS data for the state for 2014–2018.

There were some statistically significant differences in business ownership rates across groups in the Colorado construction-related professional services industry.

- About 5 percent of African American workers in the construction-related professional services industry were business owners, less than the business ownership rate among non-Hispanic whites (13%).
- Approximately 7 percent of Asian American workers in the construction-related professional services industry were self-employed, less than the rate for non-Hispanic whites.
- The self-employment rate for Hispanic Americans in the construction-related professional services industry was slightly more than 8 percent, significantly lower than the rate for non-Hispanic whites.

- Native Americans in the construction-related professional services industry had a business ownership rate of less than 3 percent, substantially lower than the rate for non-Hispanic whites.
- The self-employment rate for women in the in the construction-related professional services industry (8%) was considerably less than the rate among men (14%).

Figure F-2.
Percentage of workers in the Colorado construction-related professional services industry who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	4.5 % **
Asian American	7.2 **
Hispanic American	8.2 *
Native American or other minority	2.7 **
Non-Hispanic white	12.9
Gender	
Female	8.0 % **
Male	13.8
Disability	
Persons with disabilities	9.3 %
All others	12.2
All individuals	12.1 %

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 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Other professional services industry. Business ownership rates among workers in other professional services in Colorado are presented in Figure F-3. There were some group differences in business ownership rates in this industry. According to 2014–2018 ACS data:

- About 17 percent of African American workers in the other professional services industry were business owners, less than the business ownership rate among non-Hispanic whites (25%). This difference was statistically significant.
- Approximately 8 percent of Asian American workers in the industry were self-employed, about a third of the rate for non-Hispanic whites (a statistically significant difference).
- Hispanic American workers in the other professional services industry had a business ownership rate of 17 percent, less than the business ownership rate among non-Hispanic whites. This difference was statistically significant.
- The self-employment rate for persons with disabilities in the industry (31%) was considerably higher than the rate among those with no disabilities (23%), a statistically significant difference.

Figure F-3.
Percentage of workers in the Colorado other professional services industry who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	16.9 % **
Asian American	8.3 **
Hispanic American	17.2 **
Native American or other minority	20.1
Non-Hispanic white	25.3
Gender	
Female	24.3 %
Male	22.7
Disability	
Persons with disabilities	31.4 % **
All others	23.0
All individuals	23.4 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Goods industry. According to 2014–2018 ACS data, there were some differences in self-employment rates among groups in the Colorado goods industry. These results are presented in Figure F-4.

- The business ownership rate among African American workers in the goods industry (4%) was less than the business ownership rate among non-Hispanic whites (8%), a statistically significant difference.
- Asian American workers in the goods industry had an ownership rate of less than 4 percent, substantially lower than the ownership rate for non-Hispanic whites (a statistically significant difference).
- Approximately 2 percent of Hispanic American workers in the goods industry were business owners, less than half of the rate for non-Hispanic whites. This difference was statistically significant.
- The self-employment rate for Native American workers in the goods industry (4%) was less than the rate for non-Hispanic whites. This was a statistically significant difference.

Figure F-4.
Percentage of workers in the Colorado goods industry who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	4.1 % **
Asian American	3.5 **
Hispanic American	2.3 **
Native American or other minority	4.0 **
Non-Hispanic white	7.6
Gender	
Female	6.4 %
Male	6.1
Disability	
Persons with disabilities	6.1 %
All others	6.2
All individuals	6.2 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Other services industry. Figure F-5 presents the percentage of workers in the Colorado other services industry who were self-employed. These results are also from ACS data for 2014–2018. There were significant differences in business ownership rates across groups in this industry.

- About 14 percent of African American workers in the other services industry were business owners, less than the rate among non-Hispanic whites (19%).
- Asian American workers in the other services industry had a business ownership rate of less than 16 percent. This was also lower than the rate for non-Hispanic whites.
- Approximately 11 percent of Hispanic American workers in the other services industry were self-employed, considerably less than the rate for non-Hispanic whites.
- The self-employment rate for women in the other services industry (15%) was less than the rate among men (17%).
- The business ownership rate for persons with disabilities in the other services industry (19%) was higher than the rate for those with no disabilities (16%).

All of these differences were statistically significant.

Figure F-5.
Percentage of workers in the Colorado other services industry who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	13.8 % **
Asian American	15.7 **
Hispanic American	11.1 **
Native American or other minority	17.9 **
Non-Hispanic white	18.9
Gender	
Female	14.7 % **
Male	17.0
Disability	
Persons with disabilities	19.4 % **
All others	15.9
All individuals	16.2 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Brokerage and investment industry. Figure F-6 presents the percentage of workers in the Colorado brokerage and investment industry who were self-employed.

- Less than 1 percent of African Americans in the brokerage and investment industry were business owners, considerably less than the business ownership rate among non-Hispanic whites (9%). This difference was statistically significant.
- The self-employment rate for Asian American workers in the brokerage and investment industry (0.7%) was substantially lower than the rate for non-Hispanic whites (a statistically significant difference).
- Hispanic American and Native American workers in the brokerage and investment industry both had a business ownership rate of 3 percent, about a third of the rate for non-Hispanic whites. These differences were statistically significant.
- The self-employment rate for women in the brokerage and investment industry (4%) was considerably less than the rate among men (12%), a statistically significant difference.

Figure F-6.
Percentage of workers in the Colorado brokerage and investment industry who were self-employed, 2014–2018

Demographic group	2014–2018
Race/ethnicity	
African American	0.5 % **
Asian American	0.7 **
Hispanic American	3.1 **
Native American or other minority	3.0 **
Non-Hispanic white	9.1
Gender	
Female	3.5 % **
Male	12.3
Disability	
Persons with disabilities	9.4 %
All others	7.5
All individuals	7.6 %

Note: ** Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Potential causes of differences in business ownership rates. Nationally, researchers have examined whether racial and gender differences in business ownership rates persist after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion and survival.⁶ Additionally, studies suggest that housing appreciation has a positive effect on small business formation and employment.⁷ However, unexplained racial and ethnic differences in financial capital remain after statistically controlling for those factors.⁸ Recent studies have found that minorities (particularly African Americans and Hispanic Americans) experience greater barriers to accessing credit and face further credit constraints at business startup and throughout business ownership than non-Hispanic whites.⁹ Access to capital is discussed in more detail in Appendix G.
- **Education.** Education has a positive effect on the probability of business ownership in most industries. Recent research confirms a significant relationship between education and ability to obtain startup capital.¹⁰ However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.¹¹

⁶ See, e.g., Lofstrom, M., & Chunbei, W. (2006). Hispanic self-employment: A dynamic analysis of business ownership, *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics*, 32(3), 507-561.

⁷ Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth, and entrepreneurship revisited. *Review of Income and Wealth*, 58, 279-306. Retrieved from <https://doi.org/10.1111/j.1475-4991.2011.00491.x>

⁸ Lofstrom, M., & Chunbei, W. (2006). Hispanic self-employment: A dynamic analysis of business ownership, *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: <https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>

⁹ Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.) Retrieved from National Community Reinvestment Coalition website: <https://ncrc.org/disinvestment/>; Robb, A. M. (2013). *Access to capital among young firms, minority-owned firms, women-owned firms and high-tech firms* (Rep.). Retrieved from Small Business Administration, Office of Advocacy website: <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/15130241/rs403tot2.pdf>; Chatterji, A. K., Chay, K. Y., & Fairlie, R. W. (2013). The impact of city contracting set-asides on black self-employment and employment. *Journal of Labor Economics*, 32(3), 507-561.

¹⁰ Robb, A. M., Fairlie, R. W., & Robinson, D. T. (2009). *Financial capital injections among new black and white business ventures: Evidence from the Kauffman firm survey*. Retrieved from [https://researchbank.swinburne.edu.au/file/aada046e-13eb-46e1-9b85-14bde636232/1/PDF%20\(Published%20version\).pdf](https://researchbank.swinburne.edu.au/file/aada046e-13eb-46e1-9b85-14bde636232/1/PDF%20(Published%20version).pdf)

¹¹ See, e.g., Fairlie, R. W., & Meyer, B. D. (1996). Ethnic and racial self-employment differences and possible explanations. *The Journal of Human Resources*, 31(4), 757-793; Butler, J. S., & Herring, C. (1991). Ethnicity and entrepreneurship in America: Toward an explanation of racial and ethnic group variations in self-employment. *Sociological Perspectives*, 34(1), 79-94. Retrieved from <https://doi.org/10.2307%2F1389144>

- **Experience.** Both prior self-employment and managerial experience are important indicators of re-entering or entering business ownership, respectively.¹² However, unexplained differences in self-employment between minorities and non-minorities still exist after accounting for business experience.¹³
- **Intergenerational links.** Intergenerational links affect one's likelihood of self-employment.¹⁴ In fact, having an entrepreneurial parent can increase the likelihood of their offspring choosing to be self-employed by up to 200 percent.¹⁵ One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.¹⁶

B. Business Ownership Regression Analysis

As discussed above, race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status.

To further examine business ownership for the Colorado study industries, Keen Independent developed multivariate regression models. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for certain personal and family characteristics of the worker.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies that have been upheld in court.¹⁷ For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and architecture and engineering industries persist after

¹² Kim, P., Aldrich, H., & Keister, H. (2006). Access (not) denied: The impact of financial, human, and cultural capital on entrepreneurial entry in the United States. *Small Business Economics*, 27(1), 5-22; Georgellis, Y., Sessions, J. G., & Tsitsianis, N. (2005). Windfalls, wealth, and the transition to self-employment. *Small Business Economics*, 25(5), 407-428.

¹³ Fairlie, R., & Meyer, B. (2000). Trends in self-employment among white and black men during the twentieth century. *The Journal of Human Resources*, 35(4), 643-669. doi:10.2307/146366

¹⁴ Andersson, L., & Hammarstedt, M. (2010). Intergenerational transmissions in immigrant self-employment: Evidence from three generations. *Small Business Economics*, 34(3), 261-276.

¹⁵ Lindquist, M. J., Sol, J., & Van Praag, M. (2015). Why do entrepreneurial parents have entrepreneurial children? *Journal of Labor Economics*, 33(2), 269-296.

¹⁶ Fairlie, R. W., & Robb, A. M. (2006). Race, families and success in small business: A comparison of African-American-, Asian-, and white-owned businesses. *Russell Sage Foundation*; Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, 25(2), 289-323.

¹⁷ For example, National Economic Research Associates, Inc. (2012). *The state of minority- and women-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: <http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf>; Mason Tillman Associates. (2011). *Illinois Department of Transportation/Illinois Tollway disadvantaged business enterprises disparity study (Vols. 2)* (Rep.). Retrieved from Illinois Department of Transportation website: <http://www.idot.illinois.gov/Assets/uploads/files/Doing-Business/Reports/OBWD/DBE/DBEDisparityStudy.pdf>; National Economic Research Associates, Inc. (1997). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the City and County of Denver.

statistically controlling for race- and gender-neutral personal characteristics.^{18, 19} Those studies developed probit econometric models using Census data, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning implementation of the Federal DBE Program.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables, such as:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, marital status, disability, number of children in the household, number of elderly people in the household and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity, gender and disability status.²⁰

Keen Independent developed probit regression models for Colorado study industries using PUMS data from the 2014–2018 ACS. The models were separated by industry and included the following number of observations:

- For the construction industry, 8,830 observations were included;
- For the construction-related professional services industry, 2,351 observations were included;
- For the other professional services industry, 10,282 observations were included;
- For the goods industry, 5,055 observations were included;
- For the other services industry, 7,374 observations were included; and
- For the brokerage and investment industry, 2,642 observations were included.

¹⁸ National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Minnesota Department of Transportation.

¹⁹ National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise availability study* (Rep.). Prepared for the Illinois Department of Transportation.

²⁰ Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed and “0” for individuals who are not self-employed. The model enables estimation of the probability that workers in each sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

Colorado construction industry in 2014–2018. Figure F-7 presents the coefficients for the probit model for individuals working in the Colorado construction industry in 2014–2018.

Several race- and gender-neutral factors were statistically significant in predicting the probability of business ownership:

- Being older was associated with a higher probability of business ownership in the construction industry, although this effect reversed for the oldest individuals;
- Having a higher number of children and people over 65 in the household were both associated with a higher probability of business ownership in the industry;
- Higher home values, higher spouse or partner income, and being able to speak English well were all associated with a higher probability of business ownership; and
- Having a four-year or advanced degree was associated with a lower probability of business ownership in the Colorado construction industry.

After statistically controlling for certain factors other than race, ethnicity and gender, there were lower rates of ownership for the following groups of workers in the construction industry:

- Hispanic Americans;
- Native Americans; and
- White females.

Each of these differences were statistically significant. Thus, members of these groups working in the local construction industry were less likely to own businesses than similarly situated non-Hispanic whites and men. Figure F-7 provides detailed results of the regression model.

Figure F-7.
Construction industry business ownership model in the Colorado marketplace, 2014–2018

Note:

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

Source:

Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.7311 **
Age	0.0502 **
Age-squared	-0.0003 **
Married	-0.0310
Number of children in household	0.0446 **
Number of people over 65 in household	0.1279 **
Owns home	-0.0345
Home value (\$0,000s)	0.0004 **
Monthly mortgage payment (\$0,000s)	0.0091
Interest and dividend income (\$0,000s)	0.0006
Income of spouse or partner (\$0,000s)	0.0009 *
Speaks English well	0.4720 **
Less than high school education	0.0335
Some college	0.0646
Four-year degree	-0.1406 **
Advanced degree	-0.1971 *
African American	-0.0512
Asian American	-0.2950
Hispanic American	-0.3367 **
Native American or other minority	-0.4473 **
White female	-0.2414 **
Disabled	0.0162

Probit regression modeling allows for further analysis of the disparities identified in business ownership rates for Hispanic Americans, Native Americans and white women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly situated non-Hispanic white males.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.²¹
2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of Hispanic Americans, Native Americans and non-Hispanic white women working in the Colorado construction industry (i.e., indicators of educational attainment as well as indicators of financial resources and constraints) to estimate the probability of business ownership of each group if they were treated the same as non-Hispanic white men. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

²¹ That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all those variables would be the same (i.e., 0).

Figure F-8 presents the simulated business ownership rate (i.e., “benchmark” rate) for Hispanic Americans, Native American and non-Hispanic white women, and compares it to the actual, observed mean probabilities of business ownership for that group. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by that group’s benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be expected based on the simulated business ownership rates of similarly situated non-Hispanic white male construction workers. Note that the “actual” self-employment rates are derived from the dataset used for these regression analyses and do not always exactly match results from the entire 2014–2018 data.

Figure F-8.
Comparison of actual business ownership rates to simulated rates for construction workers in Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	13.3 %	27.9 %	48
Native American or other minority	15.8	28.0	56
Non-Hispanic white female	24.0	31.1	77

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Results from these analyses show lower actual self-employment rates for Hispanic Americans, Native Americans and non-Hispanic white women when compared with simulated ownership rates for these groups.

- **Hispanic Americans.** In the Colorado construction industry, Hispanic Americans had an actual business ownership rate of 13.3 percent, less than the benchmark rate of 27.9 percent. With a disparity index of 48, Hispanic Americans in the industry had business ownership rates substantially lower than the rate that would be expected based on simulated ownership rates of non-Hispanic white males. Because the disparity index was less than 80, the disparity was substantial.
- **Native American or other minorities.** Among Native Americans in the construction industry, the actual business ownership rate was 15.8 percent. This is less than the benchmark rate of 28 percent. With a disparity index of 56, Native Americans working in the construction industry owned businesses well below the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers. This disparity was also substantial.

- Women.** The actual ownership rate for non-Hispanic white women in the construction industry was 24 percent, which is less than the benchmark rate of 31.1 percent. Non-Hispanic white women owned businesses at about three-fourths of the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers. This disparity was substantial (disparity index of 77).

Colorado construction-related professional services industry in 2014 through 2018. Using the same data source as for the construction industry (2014–2018 ACS data), Keen Independent developed a business ownership regression model for people working in the Colorado construction-related professional services industry.

Figure F-9 presents the coefficients for that probit model. After controlling for certain other personal and family characteristics, business ownership rates in the construction-related professional services industry were lower for Asian Americans, non-Hispanic white women and persons with disabilities. These differences were statistically significant. Figure F-9 shows these results.

Figure F-9.
Construction-related professional services industry business ownership model in the Colorado marketplace, 2014–2018

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

Source:
Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-8.0825 **
Age	0.0756 **
Age-squared	-0.0005
Married	-0.0890
Number of children in household	0.0112
Number of people over 65 in household	0.0830
Owens home	-0.3701 **
Home value (\$0,000s)	0.0003 **
Monthly mortgage payment (\$0,000s)	0.0347
Interest and dividend income (\$0,000s)	0.0051 **
Income of spouse or partner (\$0,000s)	0.0011 *
Speaks English well	4.8702 **
Less than high school education	0.3890
Some college	-0.0474
Four-year degree	-0.1011
Advanced degree	-0.0151
African American	-0.3943
Asian American	-0.3807 **
Hispanic American	-0.2644
Native American or other minority	-0.7220
White female	-0.2640 **
Disabled	-0.3379 *

Using the same approach as for the construction industry, Keen Independent simulated business ownership rates for individuals working in the Colorado construction-related professional services industry (presented in Figure F-10).

- Actual business ownership rates for Asian Americans (6.3%) is considerably less than the benchmark business ownership rate (11.1%), indicating a substantial disparity.
- Non-Hispanic white women had an actual business ownership rate of 8.8 percent compared to a benchmark rate of 13.7 percent (a substantial disparity).
- Persons with disabilities had an actual business ownership rate of 10.1 percent, less than the benchmark business ownership rate of 11.8 percent. Because the disparity index for persons with disabilities is higher than 80, it is not substantial.

Figure F-10.

Comparison of actual business ownership rates to simulated rates for construction-related professional service workers in the Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian American	6.3 %	11.1 %	56
Non-Hispanic white female	8.8	13.7	64
Persons with disabilities	10.1	11.8	85

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Colorado other professional services industry in 2014 through 2018. Keen Independent also developed a business ownership regression model for people working in the other professional services industry using the same data source.

Figure F-11 presents the coefficients for that probit model. After controlling for certain other personal and family characteristics, business ownership rates in the industry were significantly lower for Asian Americans.

Figure F-11.
Other professional services industry
business ownership model in the
Colorado marketplace,
2014–2018

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

Source:
Keen Independent Research from 2014–2018 ACS
Public Use Microdata samples. The 2014–2018 ACS
raw data extract was obtained through the IPUMS
program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.8879 **
Age	0.0267 **
Age-squared	0.0000
Married	0.0185
Number of children in household	0.0439 **
Number of people over 65 in household	0.0984 **
Owens home	-0.0744
Home value (\$0,000s)	0.0003 **
Monthly mortgage payment (\$0,000s)	-0.0069
Interest and dividend income (\$0,000s)	0.0009
Income of spouse or partner (\$0,000s)	0.0011 **
Speaks English well	-0.3434
Less than high school education	0.2176
Some college	0.0772
Four-year degree	0.1735 *
Advanced degree	0.2646 **
African American	-0.0619
Asian American	-0.5797 **
Hispanic American	-0.1163
Native American or other minority	-0.0535
White female	0.0302
Disabled	0.1130

Using the same approach as for the previous industries, Keen Independent simulated business ownership rates for individuals working in the other professional services industry (presented in Figure F-12).

Actual business ownership rates for Asian Americans (8.7%) is considerably less than the benchmark business ownership rate (19.1%), indicating a substantial disparity.

Figure F-12.

Comparison of actual business ownership rates to simulated rates for other professional service workers in the Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian American	8.7 %	19.1 %	46

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-3.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Colorado goods industry in 2014 through 2018. Coefficient estimates for a business ownership regression model for people working in the Colorado goods industry is presented in Figure F-13.

After controlling for certain other personal and family characteristics, business ownership rates in the goods industry were significantly lower for Hispanic Americans.

Figure F-13.

Goods industry business ownership model in the Colorado marketplace, 2014–2018

Note:

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

Source:

Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.6128 **
Age	-0.0015
Age-squared	0.0003 *
Married	0.1982 *
Number of children in household	0.0497
Number of people over 65 in household	-0.0547
Owns home	0.0698
Home value (\$0,000s)	0.0004 **
Monthly mortgage payment (\$0,000s)	-0.0269
Interest and dividend income (\$0,000s)	0.0024
Income of spouse or partner (\$0,000s)	0.0014 **
Speaks English well	0.1528
Less than high school education	0.1729
Some college	0.0966
Four-year degree	0.2910 **
Advanced degree	-0.1193
African American	-0.0689
Asian American	-0.2024
Hispanic American	-0.2851 **
Native American or other minority	-0.0692
White female	-0.0157
Disabled	-0.0980

Using the same methodology as for other study industries, Keen Independent simulated business ownership rates for individuals working in the Colorado goods industry (presented in Figure F-14).

Actual business ownership rates for minorities (2.6%) is less than the benchmark business ownership rate (6.1%), indicating a substantial disparity.

Figure F-14.

Comparison of actual business ownership rates to simulated rates for goods workers in the Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	2.6 %	6.1 %	43

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-4.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Colorado other services industry in 2014 through 2018. Figure F-15 presents the coefficients for the business ownership probit model for people working in the Colorado other services industry. Business ownership rates in the other services industry were lower for Hispanic Americans after controlling for some personal and family characteristics. This difference was statistically significant.

Figure F-15.
Other services industry business ownership model in the Colorado marketplace, 2014–2018

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

Source:
Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.7317 **
Age	0.0413 **
Age-squared	-0.0002 **
Married	-0.0667
Number of children in household	0.0323
Number of people over 65 in household	-0.0660
Owens home	0.0784
Home value (\$0,000s)	0.0004 **
Monthly mortgage payment (\$0,000s)	-0.0361
Interest and dividend income (\$0,000s)	0.0022
Income of spouse or partner (\$0,000s)	-0.0002
Speaks English well	0.4063 **
Less than high school education	-0.0006
Some college	0.0472
Four-year degree	0.0460
Advanced degree	0.0763
African American	-0.1638
Asian American	0.0358
Hispanic American	-0.1641 **
Native American or other minority	0.0409
White female	-0.0378
Disabled	0.0182

Figure F-16 presents simulated business ownership rates for individuals working in the Colorado other services industry. Actual business ownership rates for minorities (10.8%) is considerably less than the benchmark business ownership rate (15.8%), indicating a substantial disparity.

Figure F-16.
Comparison of actual business ownership rates to simulated rates for other service workers in the Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	10.8 %	15.8 %	69

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-5.
Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Colorado brokerage and investment industry in 2014 through 2018. Keen Independent also developed a business ownership regression model for people working in the Colorado brokerage and investment industry. Figure F-17 presents these results.

After controlling for certain other personal and family characteristics, business ownership rates in the brokerage and investment industry were lower for African Americans, Asian Americans, Hispanic Americans and non-Hispanic white women. These differences were statistically significant.

Figure F-17.
Brokerage and investment industry business ownership model in the Colorado marketplace, 2014–2018

Note:
*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.
Due to small sample size, all minorities were combined into a single category.

Source:
Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.4380
Age	0.0015
Age-squared	0.0003
Married	-0.0266
Number of children in household	-0.0061
Number of people over 65 in household	0.1351
Owens home	-0.0997
Home value (\$0,000s)	0.0001
Monthly mortgage payment (\$0,000s)	0.0731 *
Interest and dividend income (\$0,000s)	0.0044 **
Income of spouse or partner (\$0,000s)	0.0008
Speaks English well	-0.8855
Less than high school education	-4.7923 **
Some college	0.1065
Four-year degree	0.4114 **
Advanced degree	0.3886 *
African American	-1.2764 **
Asian American	-1.3837 **
Hispanic American	-0.3577 *
Native American or other minority	-0.3591
White female	-0.5764 **
Disabled	0.1014

Keen Independent simulated business ownership rates for individuals working in the Colorado brokerage and investment industry. These results are presented in Figure F-18.

- The actual ownership rate for African Americans (0.6%) is considerably less than the benchmark business ownership rate (10.6%), indicating a substantial disparity.
- Asian Americans had an actual business ownership rate of 0.6 percent and a benchmark business ownership rate of 11.3 percent (a substantial disparity).
- Hispanic Americans had an actual business ownership rate of 3.7 percent and a benchmark business ownership rate of 8.6 percent. This was also a substantial disparity.
- Non-Hispanic white women had an actual business ownership rate of 4.5 percent compared to a benchmark rate of 12.5 percent (a substantial disparity).

Figure F-18.

Comparison of actual business ownership rates to simulated rates for brokerage and investment workers in the Colorado marketplace, 2014–2018

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
African American	0.6 %	10.6 %	6
Asian American	0.6	11.3	5
Hispanic American	3.7	8.6	43
Non-Hispanic white female	4.5	12.5	36

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-6.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata samples. The 2014–2018 raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

C. Summary of Business Ownership in Colorado

Keen Independent examined whether there were differences in business ownership rates for workers in the Colorado construction, construction-related professional services, other professional services, goods, other services and brokerage and investment industries related to race, ethnicity, gender and disability status.

- There were disparities in business ownership rates for all minority groups (except African Americans) working in the construction industry in 2014–2018. After statistically controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates were found for Hispanic Americans, Native Americans and non-Hispanic white women. These disparities were substantial.
- In the construction-related professional services industry, there were disparities in business ownership rates for all minority groups and non-Hispanic white women in 2014–2018. After controlling for certain factors, statistically significant disparities in business ownership rates were found for Asian Americans, non-Hispanic white women and persons with disabilities. All of the disparities (except for persons with disabilities) were substantial.
- There were disparities in business ownership rates for African Americans, Asian Americans and Hispanic Americans in the other professional services industry in 2014–2018. After controlling for education, age and other personal characteristics, there were statistically significant disparity in business ownership rates for Asian Americans. This disparity was substantial.

- All minority groups working in the goods industry in 2014–2018 had disparities in business ownership rates. After statistically controlling for certain factors, a statistically significant and substantial disparity in business ownership rate was found for Hispanic Americans.
- There were disparities in business ownership rates for all minority groups and non-Hispanic white women working in the Colorado other services industry in 2014–2018. After controlling for certain factors, a statistically significant disparity in business ownership rate was found for Hispanic Americans. The disparity was substantial.
- All minority groups and women working in the brokerage and investment industry had significantly lower business ownership rates when compared with non-Hispanic whites and males, respectively. After controlling for education, age and other personal characteristics, there were statistically significant disparities in business ownership rates for all of these groups (except for Native Americans). These disparities were substantial.

These disparities in business ownership rates result in fewer companies owned by minorities, women and persons with disabilities for these industries in the Colorado marketplace relative to nonminority male-owned firms.

APPENDIX G.

Access to Capital for Business Formation and Success

Access to capital is a key factor for initial formation and long-term success of businesses. Race and gender discrimination in capital markets hinders people of color and women from acquiring the capital necessary to start, operate or expand businesses.^{1, 2} Discrimination may also affect access to capital for LGBT individuals and persons with disabilities.

The amount of start-up capital can affect long-term business success and studies have found that minority- and women-owned businesses have, on average, less start-up capital than non-Hispanic white-owned businesses and male-owned businesses, respectively.³ According to a national U.S. Census Bureau survey:

- In 2012, 25 percent of white-owned businesses indicated that they had start-up capital of \$25,000 or more.
- Only 12 percent of African American-owned businesses indicated a comparable amount of start-up capital.
- Disparities in start-up capital were identified for every other minority group except Asian Americans.
- Just 15 percent of women-owned businesses reported start-up capital of \$25,000 or more compared with 27 percent of male-owned businesses (not including businesses that were equally owned by men and women).⁴

Race- or gender-based discrimination affecting the availability of start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have been formed.⁵ Discrimination in the traditional means of obtaining start-up capital (e.g., the ability to obtain a business loan and having equity in a home and the ability to borrow against that equity) also impacts business survival and success. Lack of access to credit, housing market discrimination and discrimination in mortgage lending have lasting effects for current or potential business owners.

¹ Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: <https://www.mbd.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>

² Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

³ Ibid.

⁴ United States Census Bureau. (2012). *2012 Survey of Business Owners* [Data file]. Available at <https://www.census.gov/library/publications/2012/econ/2012-sbo.html>

⁵ Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

Appendix G presents information about start-up capital and business credit markets nationally and in Colorado. It also provides information on the relationship between business success and mortgage lending, as home equity is often a vital source of capital to start and expand businesses. Note that all results based on secondary data pertain to pre-COVID-19 pandemic conditions.

A. Start-Up Capital

The study team analyzed financing patterns, with a focus on sources of start-up capital, to explore any differences in access to capital for people of color and women.

Data sources used to evaluate trends in start-up capital do not include information on sexual orientation, gender identity or disability status. Therefore, this analysis does not examine start-up capital for LGBT individuals or persons with disabilities.

Sources of start-up capital. The most common sources of capital used to start or acquire a business according to the U.S. Census Bureau are:

- Personal or family savings of owner(s);
- Personal or family assets other than savings of owner(s);
- Personal or family home equity loan;
- Personal credit card(s) carrying balances;
- Business credit card(s) carrying balances;
- Business loan from federal, state or local government;
- Government-guaranteed business loan from a bank or financial institution;
- Business loan from a bank or financial institution;
- Business loan or investment from family or friends;
- Investment by venture capitalist(s); and
- Grants.

According to the U.S. Census Bureau's Annual Business Survey (ABS), the primary source of capital used to start or acquire a business in 2017 was personal and/or family savings.⁶ National patterns among employer businesses (those with paid employees other than the owner) identified in the ABS include the following for 2017:

- Women-owned firms were slightly more likely than male-owned businesses to report using personal and family savings for start-up capital (67% and 65%, respectively).
- African American-, Asian American- and Hispanic American-owned businesses were most likely to use personal/family savings as a source of start-up capital (72%).

⁶ The Annual Business Survey provides economic and demographic data for nonfarm employer businesses that file the 941, 944 or 1120 tax forms by ethnicity, race and gender. This differs from the U.S. Census Bureau's Survey of Business Owners which collects data on employer businesses and non-employer businesses with receipts of \$1,000 or more. ABS data released in 2018 and referencing 2017 are the most recent data available.

- American Indian- and Alaska Native-owned businesses (69%) and Native Hawaiian and other Pacific Islander-owned businesses (67%) were also likely to rely on personal or family savings for start-up capital.
- Non-Hispanic white-owned businesses were the least likely to use personal/family savings for start-up capital (66%).

Nationally, businesses owned by non-Hispanic whites and Asian American males reported lower reliance on the use of credit cards as a source of start-up capital than women and other people of color. The following ABS results pertain to employer businesses in 2017:

- About 15 percent of African American-owned businesses used personal credit cards as a source of start-up capital, followed by Native Hawaiian- and other Pacific Islander-owned firms (14%), American Indian and Alaska Native-owned businesses (13%) and Hispanic American-owned firms (12%).
- Only 9 percent of Asian American- and non-Hispanic white-owned businesses reported using personal credit cards as a source of start-up capital.
- Female-owned businesses (10%) were somewhat more likely to use personal credit cards as a source of start-up capital compared with male-owned businesses (8%).

Credit card financing of debt is more expensive than business loans through financial institutions.⁷ Reliance on this more expensive method of financing presents additional challenges to business success, which disproportionately affects women and most minority groups.

Wealth. Since personal and family savings were the most common source of start-up capital used to start or acquire a business, the study team examined data on wealth-holding to further explore implications for people of color and women.

In 2016, white households had, on average, higher income and net worth levels than African American and Hispanic American households. White households were less likely to have zero or negative net worth and had more assets than African American and Hispanic American households. White households also had greater mean net housing wealth than African American and Hispanic American households.⁸ Figure G-1 provides household financial data by race and ethnicity for 2016.

All minority groups except for Asian Americans had relatively lower levels of household wealth compared to non-Hispanic whites. Given the heavy dependence upon personal and family savings of the owner as the main source of start-up capital, lower levels of wealth among people of color may result in greater difficulty acquiring the capital necessary to start, operate or expand businesses.

⁷ Robb, A. (2018). *Financing patterns and credit market experiences: A comparison by race and ethnicity for U.S. employer firms* (Rep. No. SBAHQ-16-M-0175). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf

⁸ Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent trends in wealth-holding by race and ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>

Figure G-1.
U.S. household financial data by race/ethnicity, 2016

	White	African American	Hispanic American	Other minority
Income				
Median	\$ 61,200	\$ 35,400	\$ 38,500	\$ 50,600
Mean	123,400	54,000	57,300	86,900
Net worth				
Median	\$ 171,000	\$ 17,600	\$ 20,700	\$ 64,800
Mean	933,700	138,200	191,200	457,800
Percent of families with zero or negative net worth	9 %	19 %	13 %	14 %
Assets (percent of families with ...)				
Primary residence	73 %	45 %	46 %	54 %
Retirement accounts	60	34	30	48
Business equity	15	7	6	13
Wealth from housing (for homeowners)				
Percent of assets in housing	32 %	37 %	39 %	35 %
Mean net housing wealth	\$ 215,800	\$ 94,400	\$ 129,800	\$ 220,700

Note: "Other minority" includes Asian Americans, Native Americans and individuals of multiple races.

Source: Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent trends in wealth-holding by race and ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>.

B. Business Credit

In addition to personal and family savings, businesses also rely on banks for start-up and expansion capital.⁹ The study team analyzed data on business loans to identify any differences in business lending to minority-, female- and white male-owned companies.

As with start-up capital, data sources used to evaluate trends in business credit do not include information on sexual orientation, gender identity or disability status. As such, analyses of business credit do not examine trends for LGBT individuals or persons with disabilities.

Successful acquisition of business loans. Data for employer businesses that secured business loans from a bank or financial institution are found in the 2016 Annual Survey of Entrepreneurs (ASE).¹⁰ In Colorado, 13 percent of businesses reported securing a business loan from a bank or financial institution. Although data by race, ethnicity or gender are not reported for individual states, data stratified by race and gender are available at the national level. These data give insight into the larger socio-economic context for firms owned by people of color in Colorado.

⁹ Robb, A. & Robinson, D. T. (2017). Testing for racial bias in business credit scores. *Small Business Economics*, 50(3), 429-443.

¹⁰ United States Census Bureau. (2016). *2016 Annual Survey of Entrepreneurs* [Data file]. Retrieved from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

Nationally, 17 percent of business obtained a business loan from a bank or financial institution in the 2016 ASE data. Minority-owned businesses were less likely than non-Hispanic white-owned firms to report securing a business loan. Figure G-2 displays the national rate of securing business loans by race and gender, according to 2016 ASE data. The figure indicates that women- and minority-owned businesses were less likely than male- and majority-owned businesses to obtain business loans from a bank or financial institution.

Figure G-2.
Percentage of U.S. employer businesses that secured business loans from a bank or financial institution, by ownership, 2016

Demographic group	Percent of respondents
Race	
African American	12.6 %
American Indian and Alaska Native	15.1
Asian American	14.5
Native Hawaiian and other Pacific Islander	14.0
White	17.2
Ethnicity	
Hispanic American	10.7 %
Non-Hispanic	17.2
Gender	
Female	14.3 %
Male	16.6
All individuals	16.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

One reason that women and people of color are less likely to secure loans is a greater reluctance to apply for business loans. The 2016 ASE collected data on whether a business needed additional financing and why the owner chose not to apply. One of the most frequently cited reasons for not applying for additional financial assistance even when needed is the firm owner’s belief that the business would not be approved by a lender.

In Colorado, 1.3 percent of all firms reported that they did not apply for additional financing because the owner believed they would not be approved by a lender. Nationally, 1.7 percent of all firms reported not applying for financing for the same reason.

Figure G-3 presents the national rate of opting out of a business loan application for fear of denial by for different groups of businesses. Nationally, business owners of color were more likely than white business owners to believe that they would not be approved by a lender. African American-owned firms were by far the most likely group to avoid additional financing due to fear that they would not be approved (6.2%). Likewise, women business owners (2.2%) were more likely to believe that they would not be approved by a lender when compared with male-owned firms (1.6%).

Figure G-3.

Percentage of U.S. employer businesses that avoided applying for additional financing because they did not think the business would be approved by lender, 2016

Demographic group	Percent of respondents
Race	
African American	6.2 %
American Indian and Alaska Native	3.9
Asian American	2.0
Native Hawaiian and other Pacific Islander	1.9
White	1.6
Ethnicity	
Hispanic American	3.2 %
Non-Hispanic	1.6
Gender	
Female	2.2 %
Male	1.6
All individuals	1.7 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

Lack of access to capital affects business profitability and long-term success. The 2016 ASE indicates that business owners of color were far more likely than non-Hispanic whites to cite access to capital as an issue negatively affecting the profitability of their company. Women businesses owners were also more likely to report that access to capital negatively affected their business profitability. Figure G-4 provides national results by race, ethnicity and gender of the business owner (data for employer firms).

Figure G-4.

Percentage of U.S. employer businesses that cited access to financial capital as negatively impacting the profitability of their business, 2016

Demographic group	Percent of respondents
Race	
African American	22.3 %
American Indian and Alaska Native	17.0
Asian American	13.3
Native Hawaiian and other Pacific Islander	19.6
White	8.9
Ethnicity	
Hispanic American	15.1 %
Non-Hispanic	9.3
Gender	
Female	10.0 %
Male	9.6
All individuals	9.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

In sum, minority- and women-owned employer businesses were less likely to secure business loans from a bank or financial institution, less likely to apply for additional financing due to fear of denial and more likely to cite the issue of access to financial capital as having a negative impact on profitability. These indicators of credit market conditions demonstrate that some barriers to business success disproportionately affect women and people of color.

The ASE data related to business lending are consistent with the findings of recent research. In 2019, the National Community Reinvestment Coalition found that more significant barriers to accessing capital through the traditional banking market exist for African American and Hispanic American small business owners. For example, African American and Hispanic American applicants for small business loans are asked to provide more documentation and are given less information about the loans than their non-Hispanic white counterparts.¹¹

Overall trends in small business lending are also important when considering credit market conditions. Small business lending was slow to recover from the Great Recession.¹² Among large banks, lending disproportionately went to large businesses, with bank lending to small businesses decreasing by nearly \$100 billion from 2008 to 2016. The decrease in small business lending coupled with greater barriers for people of color and women may have perpetuated an environment where minorities and women have more difficulty acquiring the capital necessary to start, operate or expand businesses.

As of the writing of this portion of this report, the COVID-19 pandemic appeared to be substantially limiting small business access to credit. Recent research also suggests that minority-owned businesses are disproportionately affected by the COVID-19 pandemic and face additional barriers in accessing business support programs. For example, one study in spring 2020 found that about 12 percent of minority businesses applying for the Paycheck Protection Program (PPP), a federal loan program intended to help small business endure the immediate effects of the pandemic, had received the funds for which they applied at the time of that analysis.¹³ The Center for Responsible Lending evaluated the lending criteria of the PPP, and found that about 95 percent of African American-owned businesses and 91 percent of Hispanic American-owned businesses would not qualify for federal assistance from this program due to a lack of prior relationship with a mainstream lending institution.¹⁴

¹¹ Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, discouragement and inequity in small business lending* (Rep.). Retrieved from National Community Reinvestment Coalition website: <https://ncrc.org/disinvestment/>

¹² Cole, R. (2018). *How did bank lending to small business in the United States fare after the financial crisis?* (Rep. No. SBAHQ-15-M-0144). Retrieved from U.S. Small Business Administration, Office of Advocacy website: <https://www.sba.gov/sites/default/files/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf>

¹³ Beer, T. (2020, May 18). Minority-owner small business struggle to gain equal access to PPP loan money. *Forbes.com*. Retrieved July 7, 2020, from <https://www.forbes.com/sites/tommybeer/2020/05/18/minority-owned-small-businesses-struggle-to-gain-equal-access-to-ppp-loan-money/>

¹⁴ Center for Responsible Lending. (2020, April 6). The Paycheck Protection Program continues to be disadvantageous to smaller businesses, especially businesses owned by people of color and the self-employed. Retrieved July 7, 2020, from https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-apr2020.pdf?mod=article_inline

2003 Survey of Small Business Finances (SSBF). Conducted by the U.S. Federal Reserve Board of Governors, the 2003 SSBF remains one of the most comprehensive sources of information to compare lending to minority- and nonminority-owned small businesses. Unlike previous surveys, the 2003 SSBF is unique in that it provides data on firm-level measurement of characteristics such as race, ethnicity, gender and ownership concentration. In addition, the 2003 SSBF is the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The 2003 SSBF surveyed 4,240 representative firms that were operating at the end of 2003.¹⁵

The SSBF collected information on businesses and business owners including:

- Information on firm and owner characteristics;
- An inventory of small businesses' use of financial services and of their financial service suppliers;
- Income and balance sheet information;
- Demographic characteristics for up to three individual owners;
- Information on the use of nonstandard work arrangements; and
- Details on the use of credit and debit card processing.

The SSBF records the geographic location of businesses by Census Division, not by city, county or state. The Mountain Central Division (or "Mountain region") includes Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. The Mountain region is the level of geographic detail most specific to Colorado, and 2003 is the most recent information available from the SSBF as the survey was discontinued after that year.

The SSBF collected information about access to capital for businesses including loan denial rates, businesses that did not apply for a loan due to fear of denial, loan values and interest rates. Results from the 2003 SSBF indicate disparities for some minorities and females within these categories. These results are largely consistent with analysis of 2016 ASE data.

Loan denial rates. The 2003 SSBF included information about rates of loan denial. Within the Mountain region, loan denial rate for minorities and women in 2003 (13%) was higher than that for nonminority male-owned businesses (10%). Because of small sample size in Mountain region, the SSBF did not present data by race/ethnicity.

Nationally, SSBF data indicated that African American-owned businesses (51%) had loan denial rates much higher than the rate for non-Hispanic white males (8%). This difference was statistically significant. After statistically controlling for race- and gender-neutral factors including various firm characteristics, the firm's credit and financial health and business owner characteristics, businesses owned by African Americans in the U.S. were more likely to have their loans denied than other businesses.

¹⁵ The Federal Reserve Board. (2003). *2003 Survey of Small Business Finances* [Data file]. Retrieved from <https://www.federalreserve.gov/pubs/oss/oss3/ssbf03/ssbf03home.html#ssbf03dat>

Businesses owned by Asian Americans (12%), Hispanic Americans (16%), Native Americans (22%) and non-Hispanic white females (11%) all had higher loan denial rates when compared with business owned by non-Hispanic white males. These differences were not statistically significant and did not persist after controlling for various race- and gender-neutral factors.

Applying for loans. The 2003 SSBF also included a question that gauged whether a business owner did not apply for a loan due to fear of loan denial. In the Mountain region, minority- and women-owned businesses that reported needing loans (29%) were more likely than non-Hispanic white-owned firms (16%) to indicate that they did not apply for those loans because of fear of loan denial. This difference was statistically significant. As with loan denial rates, responses for individual race/ethnicity and gender group were not available within the Mountain region due to small sample size.

Nationwide, businesses owned by African Americans (47%), Asian Americans (19%), Hispanic Americans (29%), Native Americans (30%) and non-Hispanic white females (22%) were more likely to forgo applying for business loans due to fear of loan denial when compared with non-Hispanic white male business owners (14%). Except for Asian American business owners, differences between all other race and gender groups and non-Hispanic white males were statistically significant.

After statistically controlling for various race- and gender-neutral factors for the firm and firm ownership, African American- and female-owned businesses were more likely to forgo applying for a loan due to fear of denial. These results were statistically significant.

Loan values. Data regarding loan values for businesses that received loans were also included in the 2003 SSBF. Among firms that received loans in the Mountain region, minority- and women-owned firms had lower average loan amounts when compared with majority-owned firms (\$98,000 and \$231,000, respectively). This trend was also seen nationwide, with non-Hispanic white male-owned firms (\$375,000) receiving higher loan values on average than minority- and women-owned firms (\$161,000). Disparities within the Mountain region and nationwide were statistically significant.

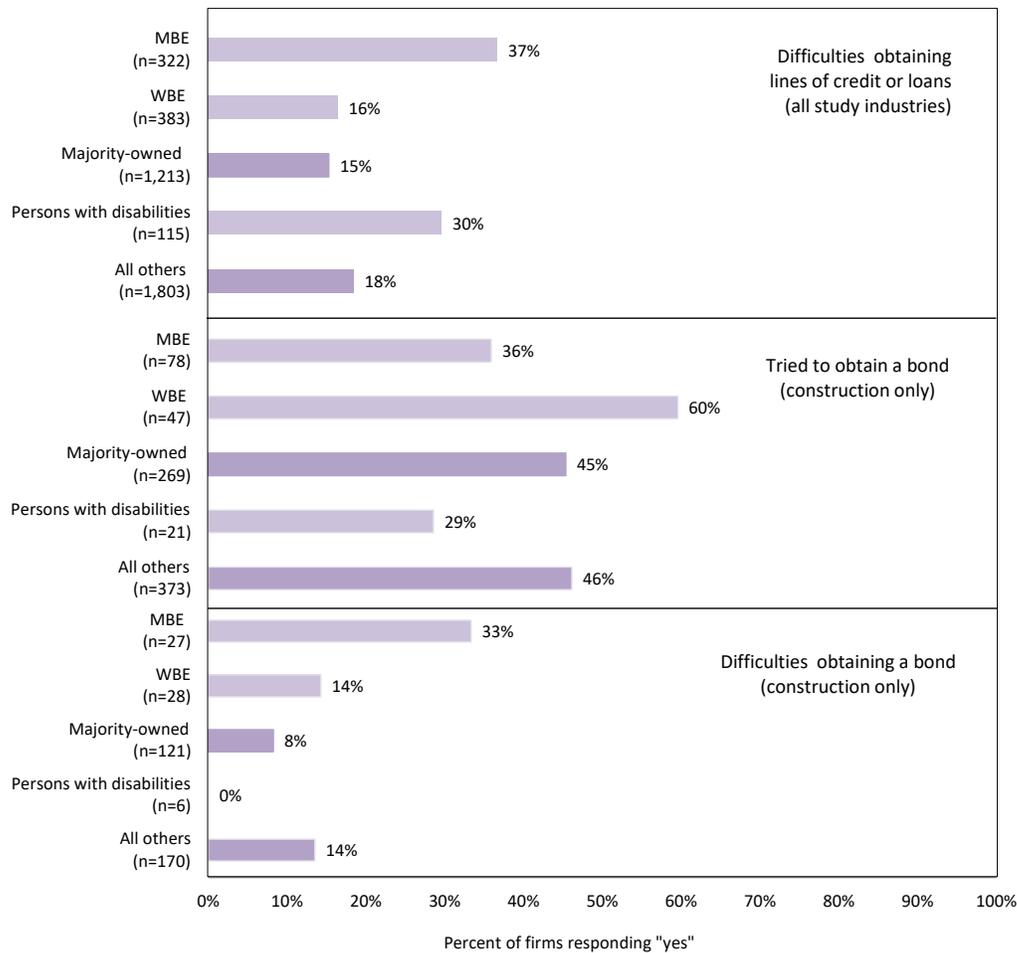
Interest rates. According to national 2003 SSBF data, minority- and female-owned businesses that were issued loans had average interest rates (7.5%) higher than for majority-owned businesses (6.4%). This difference was statistically significant. After accounting for various race- and gender-neutral business and business owner characteristics, statistically significant disparities persisted among African American- and Hispanic American-owned firms. African American-owned businesses received loans with interest rates approximately 2 percentage points higher than non-Hispanic white male-owned businesses, while businesses owned by Hispanic Americans received loans with interest rates approximately 1 percentage point higher than majority-owned businesses.

Although minorities and females were issued loans with a higher interest rate on average (9.4%) than non-Hispanic white males (6.7%) within the Mountain region, the difference was not statistically significant.

Results from the Keen Independent 2020 availability surveys. In the Keen Independent availability surveys, the study team asked questions regarding potential barriers or difficulties firms might have experienced in the Colorado 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 business start-up or expansion, or with obtaining work. Think about your experiences in the past six years in Colorado as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties. Responses to questions about access to capital were combined for all industries; responses about bonding are only for construction firms.

Figure G-5 presents results related to access to capital and bonding. The first question asks, “Has your company experienced any difficulties in obtaining lines of credit or loans?” About 37 percent of minority-owned firms and 16 percent of white woman-owned firms reported difficulties obtaining lines of credit or loans. About 15 percent of majority-owned businesses reported similar difficulties (“majority-owned business” in Figure G-5 are firms not owned by people of color or women). Additionally, 30 percent of responding firms owned by persons with disabilities reported difficulties obtaining lines of credit or loans, and 18 percent of all others reported such difficulties.

Figure G-5.
Responses to availability interview questions concerning loans and bonding, Colorado



Source: Keen Independent Research from 2020 availability survey.

To research whether bonding presented a barrier to businesses, Keen Independent asked firms completing availability interviews:

- “Has your company obtained or tried to obtain a bond for a project or contract?”
- [and if so] “Has your company had any difficulties obtaining bonds needed for a project or contract?”

Among Colorado construction firms that had tried to obtain a bond, minority-owned firms were about four times more likely to report difficulties (33%) and women-owned firms were about twice as likely to report difficulties receiving bonds (14%) when compared with majority-owned businesses (8%).

There were no surveyed construction firms owned by persons with disabilities in the construction industry that indicated difficulties obtaining a bond.

C. Homeownership and Mortgage Lending

The study team also analyzed homeownership and the mortgage lending market to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Note that not all data sources used to examine homeownership and mortgage lending include information on disability status. No data used in this analysis provide information on sexual orientation or gender identity.

Homeownership. There is a strong relationship between the likelihood of starting a new business and the potential entrepreneur’s home equity.¹⁶ Wealth created through homeownership can be an important source of capital to start or expand a business.¹⁷ Research has shown:

- Homeownership is a tool for building wealth;¹⁸
- More personal wealth provides additional options for financing because higher wealth enables both self-financing and wealth leveraging via borrowing from the equity in one’s home;¹⁹
- Business owners tend to use home equity to finance business investments, confirming that home equity is an efficient means of business financing;²⁰

¹⁶ Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies*, 28(8), 2399-2428.

¹⁷ The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

¹⁸ McCabe, B. J. (2018). Why buy a home? Race, ethnicity, and homeownership preferences in the United States. *Sociology of Race and Ethnicity*, 4(4), 452-472.

¹⁹ Bates, T., Bradford, W., & Jackson, W. E. (2018). Are minority-owned businesses underserved by financial markets? Evidence from the private-equity industry. *Small Business Economics*, (50)3, 445-461.

²⁰ Corradin, S., & Popov, A. (2015). House prices, home equity borrowing, and entrepreneurship. *The Review of Financial Studies*, 28(8), 2399-2428.

- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses;²¹
- Race and gender wealth inequality contributes to lower rates of homeownership among women and minorities; and
- The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.²²

Barriers to homeownership and creation of home equity for certain groups can impact business opportunities. Similarly, 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 from recent work history (this is done by independently examining workers that recently experienced a job loss and those that did not). A study focusing on minorities and women found a strong relationship between increases in home equity and entry into self-employment for both groups.²³

The study team analyzed homeownership rates, home values and the home mortgage market in Colorado from 2014–2018. Data were not available for LGBT individuals.

Homeownership rates. The study team used 2014–2018 American Community Survey (ACS) data to examine homeownership rates in Colorado. About 70 percent of nonminority heads of households owned homes. As shown in Figure G-6 on the following page, homeownership rates for all minority groups are lower than for non-Hispanic whites. For example, just 38 percent of African American heads of households in Colorado were homeowners during that time period. Households headed by persons with disabilities also had lower rates of homeownership.

Lower rates of homeownership may reflect lower incomes and wealth for people of color and persons with disabilities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.²⁴ Recent research shows that while African Americans narrowed the homeownership gap in the 1990s, the first half of the following decade brought little change and the second half of the decade brought significant losses (which included the Great Recession), resulting in a widening of the gap between African Americans and non-Hispanic whites.²⁵

²¹ Cavalluzzo, K., & Wolken, J. (2005). Small business loan turndowns, personal wealth and discrimination. *Journal of Business*, 78(6), 2153-2178.

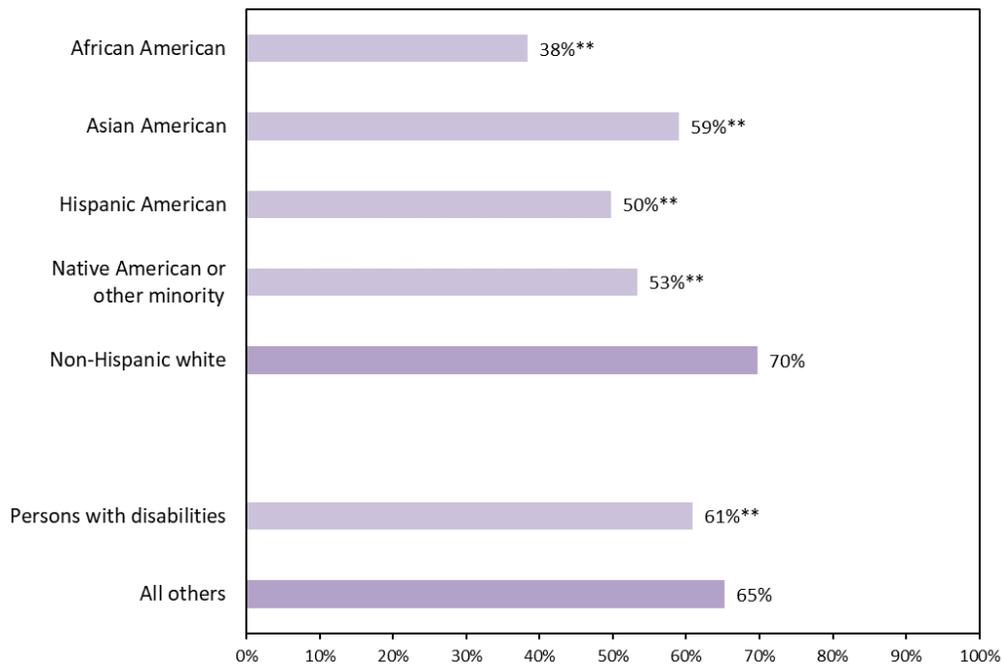
²² Baradaran, M. (2017). *The color of money: Black banks and the racial wealth gap*. London, England: The Belknap Press of Harvard University Press.

²³ Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity constraints, household wealth and entrepreneurship revisited. *Review of Income and Wealth*, 58(2), 279-306. Retrieved from <https://doi.org/10.1111/j.1475-4991.2011.00491.x>

²⁴ Board of Governors of the Federal Reserve System. (2017). Residential mortgage lending in 2016: Evidence from the Home Mortgage Disclosure Act. *Federal Reserve Bulletin*, 103(6).

²⁵ Rosenbaum, E. (2012). *Home ownership's wild ride, 2001-2011* (Rep.). New York, NY: Russell Sage Foundation.

Figure G-6.
Percentage of Colorado households that are homeowners, 2014–2018



Note: ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata sample. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Home values. Research has shown that increases in home equity encourage business ownership.²⁶ Using 2014 through 2018 ACS data, the study team compared median home values by race/ethnicity group and disability status.

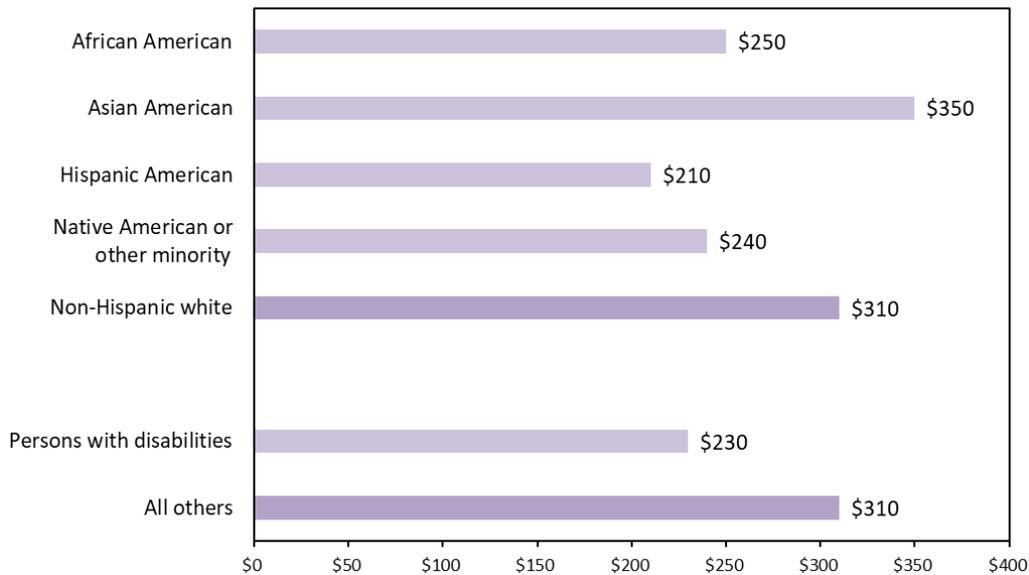
Figure G-7 presents median home values by group in Colorado for 2014 to 2018. African Americans (\$250,000), Hispanic Americans (\$210,000) and Native Americans (\$240,000) who owned homes had lower median home values than non-Hispanic whites (\$310,000). The median value of Asian American homeowners' homes (\$350,000) exceeded that of non-Hispanic whites.

Additionally, persons with disabilities (\$230,000) reported a median home value lower than all others (\$310,000).

Note that one might expect median home values for different groups more likely to live in higher-cost housing markets (such as the Denver Metropolitan Area) to exceed median home values for other groups. The difference in median home values between African American homeowners and non-Hispanic white homeowners is all the more striking given this factor.

²⁶ Harding, J., & Rosenthal, S. S. (2017). Homeownership, housing capital gains and self-employment. *Journal of Urban Economics*, 99, 120-135.

Figure G-7.
Median home values in Colorado, 2014–2018, thousands



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

Source: Keen Independent Research from 2014–2018 ACS Public Use Microdata sample. The 2014–2018 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Mortgage lending. People of color may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought to the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.²⁷

The study team explored market conditions for mortgage lending in Colorado. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive.²⁸ Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit

²⁷ Savage, C. (2011, December 21). \$335 million settlement on countrywide lending bias. *The New York Times*. Retrieved March 1, 2018, from <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>

²⁸ Depository institutions were required to report 2017 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$42 million for 2013), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding \$25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans. The most recent year of HMDA data available are from 2018.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2013, 2017 and 2018. There were 7,190 lending institutions included in the 2013 data.²⁹ The number of institutions decreased to 5,852 in 2017 and to 5,683 by 2018.^{30, 31}

Mortgage denials. The study team examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.³² 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.³³

Figure G-8 presents loan denial rates for high-income households in Colorado in 2013, 2017 and 2018.

- In each year, the loan denial rate was higher for people of color who had high incomes than for non-Hispanic white applicants who had high incomes, except for Native Hawaiians and Asian Americans in 2017.
- In 2018, the loan denial rate among Hispanic American applicants with high incomes (16%) was more than twice the rate for non-Hispanic white applicants with high incomes (6%).
- Similarly, African American high-income applicants (13%) were denied at about twice the rate for non-Hispanic white high-income applicants.

²⁹ Bhutta, N., & Ringo, D. R. (2015). The 2013 Home Mortgage Disclosure Act data. *Federal Reserve Bulletin*, 102(6).

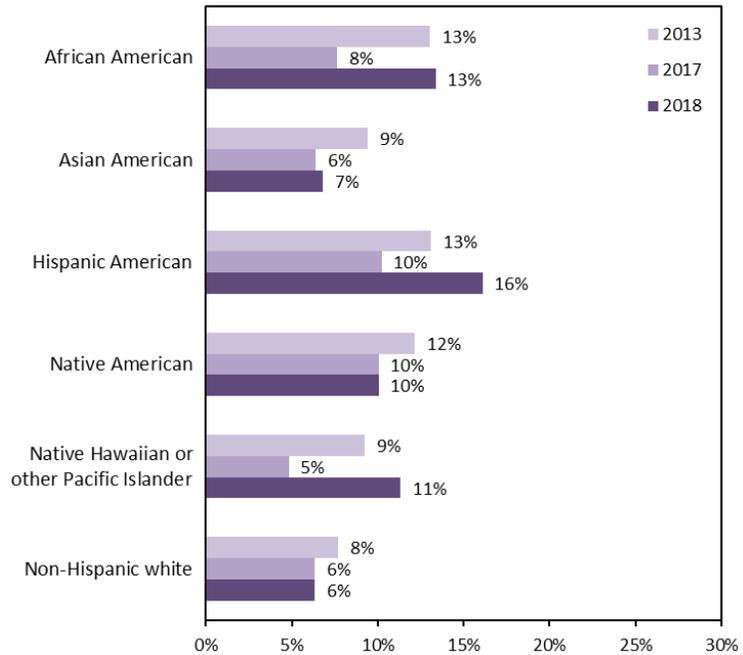
³⁰ Consumer Financial Protection Bureau. (2018). FFIEC announces availability of 2017 data on mortgage lending. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2017-data-mortgage-lending/>

³¹ Consumer Financial Protection Bureau. (2019). FFIEC announces availability of 2018 data on mortgage lending. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2018-data-mortgage-lending/>

³² Median family income for the Denver, CO MSA was about \$78,000 in 2013 and \$84,000 in 2017. Likewise, median family income for the non-metro portion of Colorado was about \$60,000 in 2013 and \$64,000 in 2017. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2013 and 2017 CRA/HMDA reports.

³³ For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

Figure G-8.
Denial rates of conventional purchase loans to high-income households in Colorado, 2013, 2017 and 2018



Note:

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

Source:

FFIEC HMDA 2013, 2017 and 2018.

Subprime lending. Loan denial is one of several ways people might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Subprime lending grew rapidly in the late 1990s and early 2000s and accounted for large growth in the home mortgage industry. 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.³⁴

With interest rates higher 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 were made available to home buyers without requirements such as a down payment or proof of income and assets; subprime loans were also made available for home buyers purchasing property at a cost above that for which they would qualify from a prime lender.³⁵

³⁴ Avery, B., Brevoort, K. P., & Canner, G. B. (2007). The 2006 HMDA data. *Federal Reserve Bulletin*, 93, A73–A109.

³⁵ Gerardi, K., Shapiro, A. H., & Willen, P. S. (2007). *Subprime outcomes: Risky mortgages, homeownership experiences, and foreclosures* (Working Paper No. 07–15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: <https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx>

Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. Fair-lending enforcement mechanisms have historically tended to overlook disparate impact and treatment and shielded some lenders with discriminating practices from investigations.³⁶

Although there is no standard definition of a subprime loan, there are several commonly used approaches to examining rates of subprime lending. The study team used a “rate-spread method” — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2013, 2017 and 2018.³⁷ Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans.

Figure G-9 shows the percent of conventional home purchase loans that were subprime in Colorado, based on 2013, 2017 and 2018 HMDA data. A higher percentage of borrowers receiving subprime loans may indicate predatory lending.

- African American, Hispanic American and Native American receiving home purchase loans were more likely to receive subprime loans than non-Hispanic whites in each of these years.
- Native Hawaiians and other Pacific Islanders were as likely to receive subprime home purchase loans as non-Hispanic whites in 2013 but were more likely in 2017 and 2018.
- Asian American borrowers were less likely to receive subprime home purchase loans than white non-Hispanic borrowers.

³⁶ Ross, S. L., & Yinger, J. (2002). *The color of credit: Mortgage discrimination, research methodology, and fair-lending enforcement*. Cambridge, MA: MIT Press.

³⁷ Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

Figure G-9.
Percent of conventional home purchase loans in Colorado that were subprime, 2013, 2017 and 2018

Note:
Subprime rates are calculated as the percentage of originated loans that were subprime.

Source:
FFIEC HMDA data 2013, 2017 and 2018.

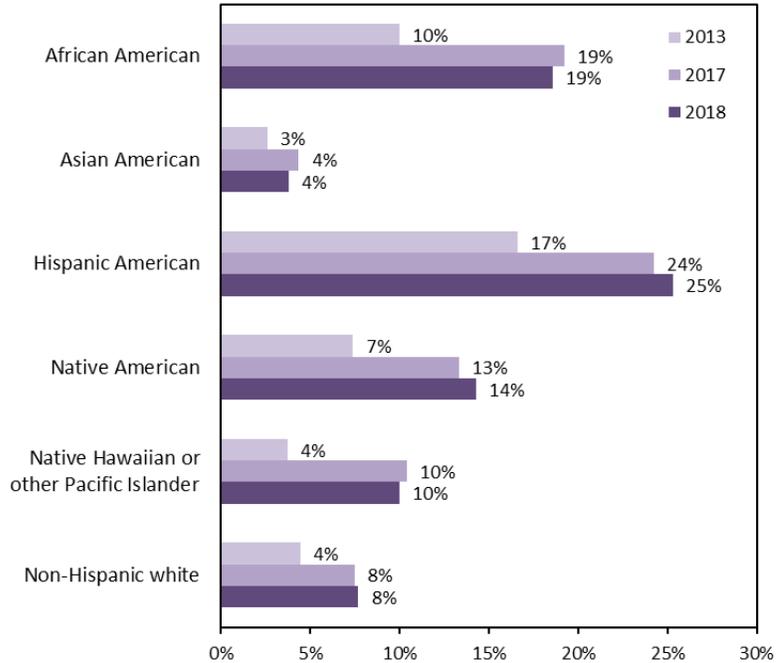
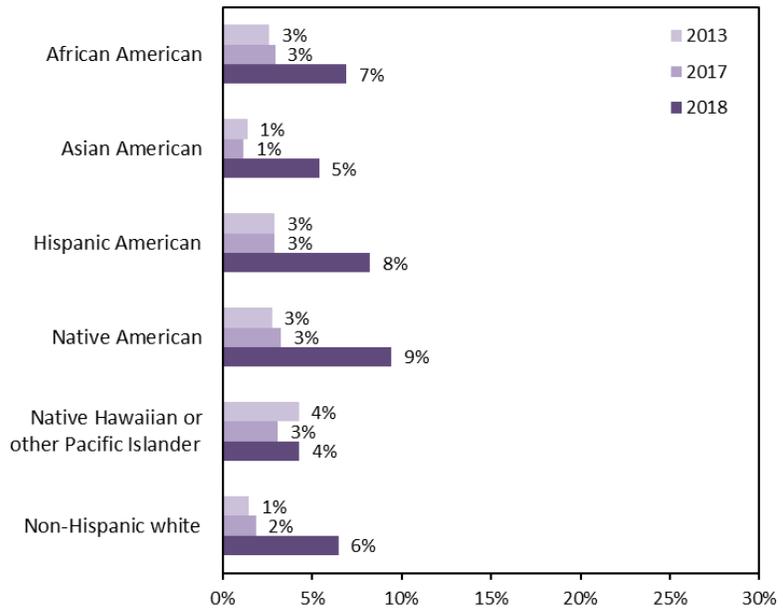


Figure G-10 examines the percentage of conventional home refinance loans that were subprime in Colorado in 2013, 2017 and 2018. There was low usage of subprime refinance loans in 2013 and 2017; the rate of subprime refinance lending increased across the board in 2018, although the increase in this rate was higher for most racial minorities than non-Hispanic whites.

Figure G-10.
Percent of conventional refinance loans in Colorado that were subprime, 2013, 2017 and 2018

Note:
Subprime rates are calculated as the percentage of originated loans that were subprime.

Source:
FFIEC HMDA data 2013, 2017 and 2018.



Additional research. Studies across the country have examined barriers to homeownership for people of color, persons with disabilities and members of the LGBT community. For example:

- A 2010 survey of Colorado residents identifying as members of the LGBT community found that white respondents were half as likely as racial minorities to report housing discrimination (9.4% and 19.8%, respectively).³⁸
- Research using data from 1968 through 2009 found that individuals who went from not having a disability to developing one were more likely than others to transition from homeownership to renting.³⁹
- A study that analyzed more than two million home sale transactions over the course of 18 years in four major metropolitan areas — Chicago, Baltimore/Maryland, Los Angeles and San Francisco — showed that African American and Hispanic American buyers pay more for the price of their house than their white counterparts in almost every purchase scenario.⁴⁰
- Researchers found that between 1999 and 2011, socioeconomic and demographic factors could only partially explain the gap in homeownership that existed between white and African Americans homeowners, and that discrimination in the mortgage process was a likely explanation.⁴¹
- Results of a mystery-shopping field study conducted at several national banks in a major metropolitan U.S. city showed that minority loan applicants were provided less comprehensive information about financing options, required to provide more information to apply for a loan and received less encouragement and assistance compared to white potential loan applicants.⁴²
- An analysis of U.S. Survey of Consumer Finance data shows that African American borrowers on average pay about 29 basis points more in interest on mortgage loans than comparable white borrowers.⁴³

³⁸ Whitfield, D. L., Walls, N. E., Langenderfer-Magruder, L., & Clark, B. (2014). Queer is the new black? Not so much: Racial disparities in anti-LGBTQ discrimination. *Journal of Gay & Lesbian Social Services*, 26(4), 426-440.

³⁹ Sharp, G., & Hall, M. (2014). Emerging forms of racial inequality in homeownership exit, 1968–2009. *Social Problems*, 61(3), 427-447.

⁴⁰ Bayer, C., Casey, M., Ferreira, F., & McMillan F. (2017). Racial and ethnic price differentials in the housing market. *Journal of Urban Economics*, 102, 91–105.

⁴¹ Fuller, C. (2015). *Race and homeownership: How much of the differences are explainable by economics alone?* Retrieved from Zillow Research website: <https://www.zillow.com/research/racial-homeownership-differences-10155/>

⁴² Bone, S. A., Christensen, G. L., & Williams, J. D. (2014). Rejected, shackled, and alone: The impact of systemic restricted choice on minority consumers' construction of self. *Journal of Consumer Research*, 41(2), 451-474.

⁴³ Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics*, 51(1), 101-120.

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.”⁴⁴ Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.⁴⁵ Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities.⁴⁶ A 2018 study, for example, examined subprime mortgage loans in seven metropolitan areas across the country. The study found that African American borrowers were 103 percent more likely and Hispanic American borrowers were 78 percent more likely than white borrowers to receive a high-cost loan for home purchases. Disparities were found for both low- and high-risk borrowers, regardless of age.⁴⁷

A 2007 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”⁴⁸

Implications of the mortgage lending crisis during the Great Recession. The ramifications of the mortgage lending crisis in the Great Recession not only continued to substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses but also created a nationwide retreat in dynamism in nearly every measurable respect.⁴⁹ (Dynamism consists of the rate and scale at which the process of reallocating the economy’s resources across firms and industries according to their most productive use occurs.) Note that all of this research was conducted before the COVID-19 pandemic.

- On July 19, 2017, Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship (SBE) Council, testified before the U.S. House of Representatives Committee on Small Business that there has been a continuing dearth of entrepreneurial activity and substantial decline over the past ten years due to the financial crises, Great Recession and a weak economic recovery that continues to negatively influence the American psyche.⁵⁰

⁴⁴ See, e.g., Hull, N.R. (2017). Crossing the line: Prime, subprime, and predatory lending. *Maine Law Review*, 61(1), 288-318; Morgan, D. P. (2007). *Defining and detecting predatory lending* (Staff rep. No. 273). New York, NY: Federal Reserve Bank of New York.

⁴⁵ Faber, J. W. (2013). Racial dynamics of subprime mortgage lending at the peak. *Housing Policy Debate*, 23(2), 328-349.

⁴⁶ Ibid; Been, V., Ellen, I., & Madar, J. (2009). The high cost of segregation: Exploring racial disparities in high-cost lending. *Fordham Urb. LJ*, 36(3), 361.

⁴⁷ Bayer, P., Ferreira, F., & Ross, S. (2018). What drives racial and ethnic differences in high-cost mortgages? The role of high-risk lenders. *Review of Financial Studies*, 31(1), 175-205.

⁴⁸ Gerardi, K., Shapiro, A. H., & Willen, P. S. (2007). *Subprime outcomes: Risky mortgages, homeownership experiences, and foreclosures* (Working Paper No. 07-15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: <https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx>

⁴⁹ Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

⁵⁰ *Reversing the Entrepreneurship Decline: Hearing before the Committee on Small Business*, House of Representatives, 115th cong. Page 3 (2017) (testimony of Ms. Karen Kerrigan).

- According to research conducted by economists for the U.S. Federal Reserve System, loan origination activity remained well below pre-Great Recession levels through at least 2016.⁵¹
- Startup rates have dropped for years, but the effects of the Great Recession were so detrimental that from 2009 to 2011 firm deaths exceeded births for the first time in more than 40 years.⁵²
- Despite a progressive decline in new business formation, 117,300 more firms opened than closed on average each year from 1977 to 2007; however, firm deaths outpaced firm births on average from 2008 to 2014.⁵³
- Small firms suffer more during financial crises due to dependence on bank capital to fund growth.⁵⁴
- Major surveys, including surveys conducted by the National Federation of Independent Businesses (NFIB) and the Federal Reserve, identify access to credit as a problem and top growth concern for small firms during the recovery.⁵⁵
- Commercial and residential real estate — which represent two-thirds of the assets of small business owners and are frequently used as collateral for loans — were hit hard during the financial crisis, making small business borrowers less creditworthy today.⁵⁶

The mortgage-lending crisis and the Great Recession have had lasting effects as they limited opportunities for homeowners with little home equity to obtain business capital through home mortgages. Furthermore, the historically higher rates of default and foreclosure for homeowners with subprime loans impacted the ability of those individuals to access to capital. Those consequences have disproportionately impacted people of color. It may be that the COVID-19 pandemic will result in widening these disparities.

⁵¹ Dore, T., & Mach, T. (2018). *Recent trends in small business lending and the Community Reinvestment Act*. Retrieved from the Board of Governors of the Federal Reserve System website: <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-small-business-lending-and-the-community-reinvestment-act-20180102.htm>

⁵² Economic Innovation Group. (2017). *Dynamism in retreat: Consequences for regions, markets, and workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

⁵³ Ibid.

⁵⁴ Mills, K.G., & McCarthy, B. (2016). *The state of small business lending: Innovation and technology and the implications for regulation* (Working Paper 17-042). Cambridge, MA. Retrieved from Harvard Business School website: http://www.hbs.edu/faculty/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-ebb3e040e55.pdf

⁵⁵ Ibid.

⁵⁶ Ibid.

Redlining. Historically, redlining referred to mortgage lending discrimination against geographic areas based on racial or ethnic characteristics of a neighborhood.⁵⁷ Presently, the concept of redlining includes an examination of the availability of and access to credit in predominantly minority neighborhoods, and the credit terms offered within a lender's assessment area.⁵⁸

Past redlining continues to shape and impact major cities in Colorado. For example, a 2018 publication from the Colorado Office of Health Equity documents instances of past redlining in Denver and covenants (which restricted property ownership based on race) throughout Colorado. This study also examined Denver in particular and found relationships between areas that were subjected to redlining, minority status, poverty, poor mental health, diabetes and current health inequities.⁵⁹

The practice of reverse redlining consists of extending high-cost credit. This discriminatory practice involves charging minority borrowers higher mortgage fee costs compared to white borrowers and was the subject of multiple lawsuits brought by the U.S. Department of Justice from the late 1990s through the early 2000s. As a result of reverse redlining, some researchers argue that mortgage discrimination has shifted from being an access to credit issue to being a discretionary pricing issue.⁶⁰

As evidenced by settlements in recent court cases, the practice of redlining continues against minority mortgage applicants. For example:

- In 2015, New York Attorney General Eric Schneiderman settled with Evans Bank for \$0.8 million after learning that Evans Bank erased African American neighborhoods from maps used to determine mortgage lending.⁶¹
- In 2015, the U.S. Department of Housing and Urban Development reached a \$200 million settlement with Associated Bank for denying mortgage loans to African American and Hispanic American applicants in Chicago and Milwaukee.⁶²

⁵⁷ Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal*, 109(2).

⁵⁸ Ibid.

⁵⁹ Hariprasad, V., Hernandez, S., & Singh, N. (2018). *Creating thriving communities in Colorado: An equity action guide* (Rep.). Retrieved from State of Colorado website: <https://www.colorado.gov/pacific/cdphe/equity-action-guide>

⁶⁰ Brescia, R. H. (2009). Subprime communities: Reverse redlining, the Fair Housing Act and emerging issues in litigation regarding the subprime mortgage crisis. *Albany Government Law Review*, 2(1), 164-216.

⁶¹ Mock, B. (2015, September 28). Redlining is alive and well—and evolving. *City Lab*. Retrieved from <https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497/>

⁶² Ibid.

- In November 2016, Hudson City Savings Bank was subject to a record redlining settlement due to disparities suffered by African American and Hispanic American loan applicants.⁶³ According to the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ), Hudson City Savings Bank avoided locating branches and loan officers, and using mortgage brokers in majority African American and Hispanic communities.

Hudson City Savings Bank also excluded majority-African American and Hispanic communities from its marketing strategy and credit assessment areas.⁶⁴

- In a different 2016 redlining legal action, the CFPB and DOJ ordered BancorpSouth Bank to pay millions to harmed minorities for illegally denying them access to credit in minority neighborhoods and denying African American applicants certain mortgage loans and over charging them, among other things.⁶⁵
- In a reverse redlining case tried in federal court in 2016, a federal jury found that Emigrant Savings Bank and Emigrant Mortgage Company violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law by aggressively promoting toxic mortgages to African American and Hispanic American applicants with poor credit.⁶⁶
- In 2017, the DOJ filed a lawsuit against KleinBank for redlining minority neighborhoods in Minnesota. According to the DOJ, KleinBank structured its residential mortgage lending business in a manner that excluded the credit needs of minority neighborhoods.⁶⁷

⁶³ Burnison, T. R., & Boccia, B. (2017). Redlining everything old is new again. *ABA Banking Journal*, 109(2).

⁶⁴ Consumer Financial Protection Bureau. (2015, September 24). *CFPB and DOJ order Hudson City Savings Bank to pay \$27 million to increase mortgage credit access in communities illegally redlined* [Press release]. Retrieved November 3, 2020 from <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/>

⁶⁵ Dodd-Ramirez, D., & Ficklin, P. (2016, June 29). Redlining: CFPB and DOJ action requires BancorpSouth Bank to pay millions to harmed consumers [Web log post]. Retrieved November 3, 2020 from <https://www.consumerfinance.gov/about-us/blog/redlining-cfpb-and-doj-action-requires-bancorpsouth-bank-pay-millions-harmed-consumers/>

⁶⁶ Lane, B. (2016, June 30). Groundbreaking ruling? Federal jury finds Emigrant Bank liable for predatory lending. *Housingwire*. Retrieved November 3, 2020 from <https://www.housingwire.com/articles/37419-groundbreaking-ruling-federal-jury-finds-emigrant-bank-liable-for-predatory-lending>

⁶⁷ Department of Justice, Office of Public Affairs. (2017, January 13). *Justice Department sues KleinBank for redlining minority neighborhoods in Minnesota* [Press release]. Retrieved November 3, 2020 from <https://www.justice.gov/opa/pr/justice-department-sues-kleinbank-redlining-minority-neighborhoods-minnesota>

Steering by real estate agents. The illegal act of steering can be defined as actions by real estate agents that differentially direct customers to certain neighborhoods and away from others based on race or ethnicity.⁶⁸ Mortgage loan originators can also engage in steering. Prior to the mortgage loan crisis, mortgage loan originators engaged in steering to generate higher profits for themselves by directing minority loan applicants to less desirable and toxic loan instruments.⁶⁹ Such steering can affect minority borrowers' perception of the availability of mortgage loans. Additionally, explicit steering can affect housing prices and result in segregation.⁷⁰

Instances of steering are not uncommon in Colorado. For example, in 2016 multiple instances of steering were reported to the U.S. Department of Housing and Urban Development. These reports included repeated attempts to steer potential tenants based on disability status and having children. Ultimately, the parties reached settlements worth between \$70,000 and \$75,000 in each case.⁷¹

It is difficult to pursue cases involving steering; however, several steering cases have been prosecuted by federal and state agencies over the past decade:

- In 2011, the U.S. Department of Justice (DOJ) reached a \$335 million settlement with Countrywide Financial Corporation for steering thousands of African American and Hispanic American borrowers into subprime mortgages when white borrowers with comparable credit received prime loans.⁷²
- In 2012, the DOJ reached a \$184 million settlement with Wells Fargo for steering African American and Hispanic American borrowers into subprime mortgages and charging higher fees and rates than for white borrowers with comparable credit profiles.⁷³

⁶⁸ Galster, G., & Godfrey, E. (2005) By words and deeds: Racial steering by real estate agents in the U.S. in 2000. *Journal of the American Planning Association*, 71(3), 251-268.

⁶⁹ Consumer Financial Protection Bureau. (2013, January 18). *CFPB issuing rules to prevent loan originators from steering consumers into risky mortgages* [Press release]. Retrieved November 3, 2020 from <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-to-prevent-loan-originators-from-steering-consumers-into-risky-mortgages/>

⁷⁰ Besbris, M., & Faber, J.W. (2017). Investigating the relationship between real estate agents, segregation, and house prices: Steering and upselling in New York State. *Sociological Forum*, 32(4), 850-873. Retrieved from <https://doi.org/10.1111/socf.12378>

⁷¹ Wilson, D. (2017, October 3). Unlawful steering and big dollar payouts. Retrieved November 3, 2020 from <https://www.aamdhq.org/news/unlawful-steering-and-big-dollar-payouts>

⁷² Department of Justice, Office of Public Affairs. (2011, December 21). *Justice Department reaches \$335 Million settlement to resolve allegations of lending discrimination by Countrywide Financial Corporation* [Press release]. Retrieved November 3, 2020 from <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>

⁷³ Department of Justice, Office of Public Affairs. (2012, July 12). *Justice Department reaches settlement with Wells Fargo resulting in more than \$175 Million in relief for homeowners to resolve fair lending claims* [Press release]. Retrieved November 3, 2020 from <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>

- In 2015, M&T Bank agreed to pay \$485,000 to plaintiffs in a settlement for a case involving racial discrimination and steering.⁷⁴
- In 2015, the City of Oakland, California sued Wells Fargo & Co for steering minorities into costly mortgage loans that supposedly led to foreclosures, abandoned properties and blight.⁷⁵ The City of Philadelphia filed a lawsuit with similar allegations against Wells Fargo & Company in 2017.⁷⁶
- In 2017, the U.S. Attorney settled a federal civil rights lawsuit against JP Morgan Chase Bank for \$53 million for steering and discrimination based on race and national origin after it was discovered that African Americans and Hispanic Americans paid higher mortgage loan rates compared with whites with comparable credit profiles.⁷⁷

Gender discrimination in mortgage lending. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets.

Recent studies and lawsuits indicate unequal access to mortgage loans for women. For example, a 2013 study by the Woodstock Institute found that women within the six-county Chicago area were far less likely to be approved for mortgage loans than men, and even male-female joint applications were less likely to be originated if the female applicant was listed first. This disparity persisted for mortgage refinancing.⁷⁸

Research has confirmed that on average, women are better than men at paying their mortgages; however, women on average pay more for mortgages relative to their risk, and women of color pay the most.⁷⁹ Although disparities in mortgage interest rates are prevalent between African American

⁷⁴ Stempel, J. (2015, August 31). M&T Bank settles lawsuit claiming New York City lending bias. *Reuters*. Retrieved November 3, 2020 from <https://www.reuters.com/article/us-usa-guns-dicks-sporting/walmart-joins-dicks-sporting-goods-in-raising-age-to-buy-guns-idUSKCN1GC1R1>

⁷⁵ Aubin, D. (2015, September 22). Oakland lawsuit accuses Wells Fargo of mortgage discrimination. *Reuters*. Retrieved November 3, 2020 from <https://www.reuters.com/article/us-wellsfargo-discrimination/oakland-lawsuit-accuses-wells-fargo-of-mortgage-discrimination-idUSKCN0RM28L20150922>

⁷⁶ City of Philadelphia, Office of the Mayor. (2015, May 15). *City files lawsuit against Wells Fargo* [Press release]. Retrieved from <https://beta.phila.gov/press-releases/mayor/city-files-lawsuit-against-wells-fargo/>

⁷⁷ Department of Justice, U.S. Attorney's Office, Southern District of New York. (2017, January 20). *Manhattan U.S. Attorney settles lending discrimination suit against JPMorgan Chase for \$53 Million* [Press release]. Retrieved November 3, 2020 from <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-lending-discrimination-suit-against-jpmorgan-chase-53>

⁷⁸ Woodstock Institute. (2013). *Unequal opportunity: Disparate mortgage origination patterns for women in the Chicago area* [Fact sheet]. Retrieved from https://woodstockinst.org/wp-content/uploads/2013/05/unequalopportunity_factsheet_march2013_0.pdf

⁷⁹ Goodman, L., Zhu, J., & Bai, B. (2016). *Women are better than men at paying their mortgages* (Rep.). Retrieved from Urban Institute website: <https://www.urban.org/sites/default/files/publication/84206/2000930-Women-Are-Better-Than-Men-At-Paying-Their-Mortgages.pdf>

and white borrowers, African American women are the most likely to experience this type of mortgage loan discrimination.⁸⁰

Recent lawsuits and studies suggest that gender-based lending discrimination continues:

- In 2017, Bellco Credit Union settled a lawsuit for alleged discrimination against women on maternity leave.⁸¹
- In 2014 the U.S. Department of Housing & Urban Development (HUD) settled a lawsuit against Mountain America Credit Union over allegations of discrimination against prospective borrowers on maternity leave.⁸²
- In 2011, HUD engaged in litigation against a company that revoked a pregnant woman's mortgage insurance once the company learned that the woman was on leave from work.⁸³
- In 2010, Dr. Budde, an oncologist from Washington State, was initially granted a mortgage loan and later denied once her lender learned she was on maternity leave.⁸⁴

D. Summary

Business start-up and long-term business success depend on access to capital. Discrimination at any link in that chain may produce cascading effects that result in racial and gender disparities in business formation and success.

The evidence presented here illustrates that people of color and women continued to face disadvantages in accessing capital that is necessary to start, operate and expand businesses as of early 2020. The COVID-19 pandemic may have the effect of widening these disparities, but data were not available at the time of writing this report.

Capital is required to start companies, so barriers to accessing capital can affect the number of people of color and women who are able to start businesses. In addition, minority and female entrepreneurs start their businesses with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses. Key results include the following:

⁸⁰ Cheng, P., Lin, Z., & Liu, Y. (2015). Racial discrepancy in mortgage interest rates. *Journal of Real Estate Finance and Economics*, 51(1), 101-120.

⁸¹ Strozniak, P. (2017, October 17). Bellco CU settles alleged discriminatory housing lawsuit. *Credit Union Times*. Retrieved November 3, 2020 from <https://www.cutimes.com/2017/10/17/bellco-cu-settles-alleged-discriminatory-housing-l>

⁸² National Mortgage Professional Magazine. (2014, June 25). HUD hits Mountain America Credit Union with \$25,000 fine. *National Mortgage Professional Magazine*. Retrieved November 3, 2020 from <https://nationalmortgageprofessional.com/news/41558/hud-hits-mountain-america-credit-union-25000-fine>

⁸³ Hanson, K. (2016). Disparate impact discrimination in residential lending and mortgage servicing based on sex: Insidious evil. *Florida Coastal Law Review*, 17(3), 421-447.

⁸⁴ Siegel Bernard, T. (2010, July 19). Need a mortgage? Don't get pregnant. *New York Times*. Retrieved November 3, 2020 from <http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html>

- Nationally, minority- and women-owned employer businesses are more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.
- Personal and family savings of the owner was the main source of capital for startups among many U.S. businesses, but African American and Hispanic American households had significantly lower amounts of wealth than whites.
- Among employer firms across the country, female- and minority-owned companies were less likely to secure business loans from a bank or financial institution as a source of start-up capital.
- Nationally, female- and minority-owned firms were more likely to not apply for additional financing because firm owners believed that they would not be approved by a lender. These firms were also more likely to indicate that access to financial capital negatively impacted firm profitability.
- Availability survey results for Colorado businesses indicate that minority- and women-owned companies were more likely than majority-owned firms to report difficulties obtaining lines of credit or loans. Firms owned by persons with disabilities were also more likely than other businesses to indicate difficulties obtaining lines or credit or loans.

Among construction firms that had attempted to obtain bonding, MBEs and WBEs were more likely than majority-owned businesses to report difficulties.

- Home equity is an important source of funds for business start-up and growth. A smaller percentage of people of color in Colorado own homes compared with non-Hispanic whites. African American, Hispanic American and Native American homeowners tend to have lower home values.
- High-income African American, Asian American, Hispanic American and Native American households applying for conventional home mortgages in Colorado were more likely to have their applications denied than high-income non-Hispanic whites. Loan denial rates for African Americans and Hispanic Americans remain more than twice as high as the loan denial rate for non-Hispanic whites. This may indicate discrimination in mortgage lending and may affect access to capital to start and expand businesses.
- Subprime lending has increased in recent years, especially for people of color. Some minority groups in 2018 were three times as likely as non-Hispanic whites to have subprime loans. This may be evidence of predatory lending practices affecting people of color in the state.

Any discrimination against people of color in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in Colorado and the success and growth of those companies.

APPENDIX H.

Success of Businesses in the Colorado Marketplace

The study team examined the success of businesses owned by people of color, women, persons with disabilities and members of the LGBT community in the Colorado construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment industries (the “study industries”) and assessed whether outcomes for business owned by these individuals differ from business outcomes for other groups. The study team examined outcomes in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

Because most of these analyses are based on secondary data, Keen Independent was limited to the business owner characteristics reported in those data. Data sources generally do not include information on sexual orientation or gender identity and some data sources do not include information on gender or disability status. Certain data sources do not provide information for Native American-owned firms, or consolidate results for all minority-owned businesses.

Most of the research based on secondary data reflects marketplace outcomes before the COVID-19 pandemic.

A. Business Closures, Expansions and Contractions

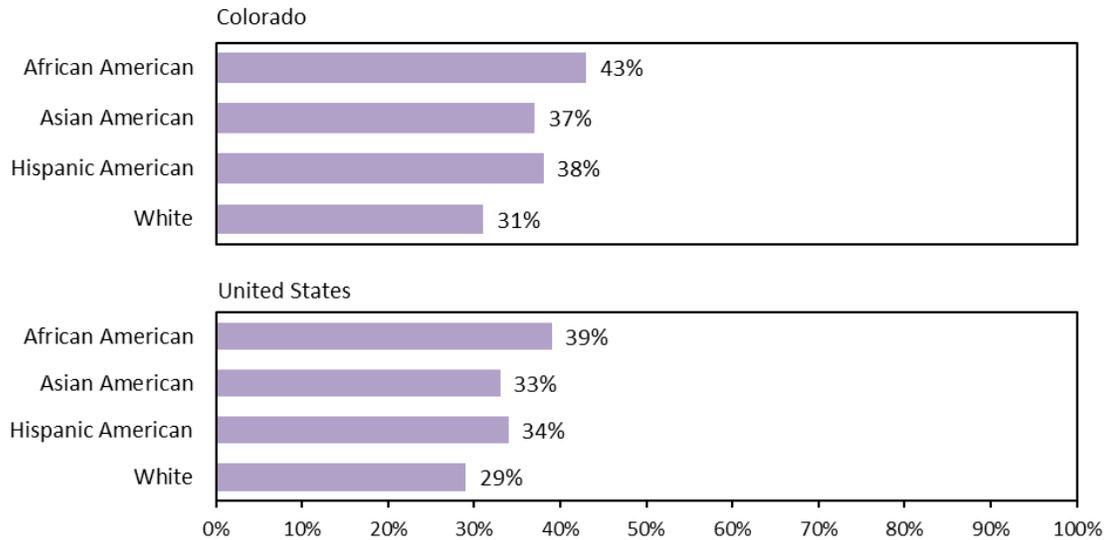
The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses nationally and statewide. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closures in Colorado. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau’s 1989–2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.^{1, 2} The SBA report examined patterns in each state.

Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses. The rate of business closure among minority-owned businesses in Colorado in 2002 through 2006 exceeded the closure rate of majority-owned businesses by as much as 12 percentage points. About 43 percent of African American-owned businesses operating had closed by the end of 2006 compared with 31 percent of businesses owned by whites. The rate of business closure among Hispanic American- and Asian American-owned firms also exceeded that of majority-owned businesses in Colorado.

Figure H-1.
Rates of business closure, 2002 through 2006, Colorado and the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) *Race/ethnicity and establishment dynamics, 2002–2006* (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

¹ Lowrey, Y. (2010). *Race/ethnicity and establishment dynamics, 2002–2006* (Rep. No. 369). Retrieved from U.S. Small Business Administration, Office of Advocacy website: <https://www.sba.gov/sites/default/files/rs369tot.pdf>

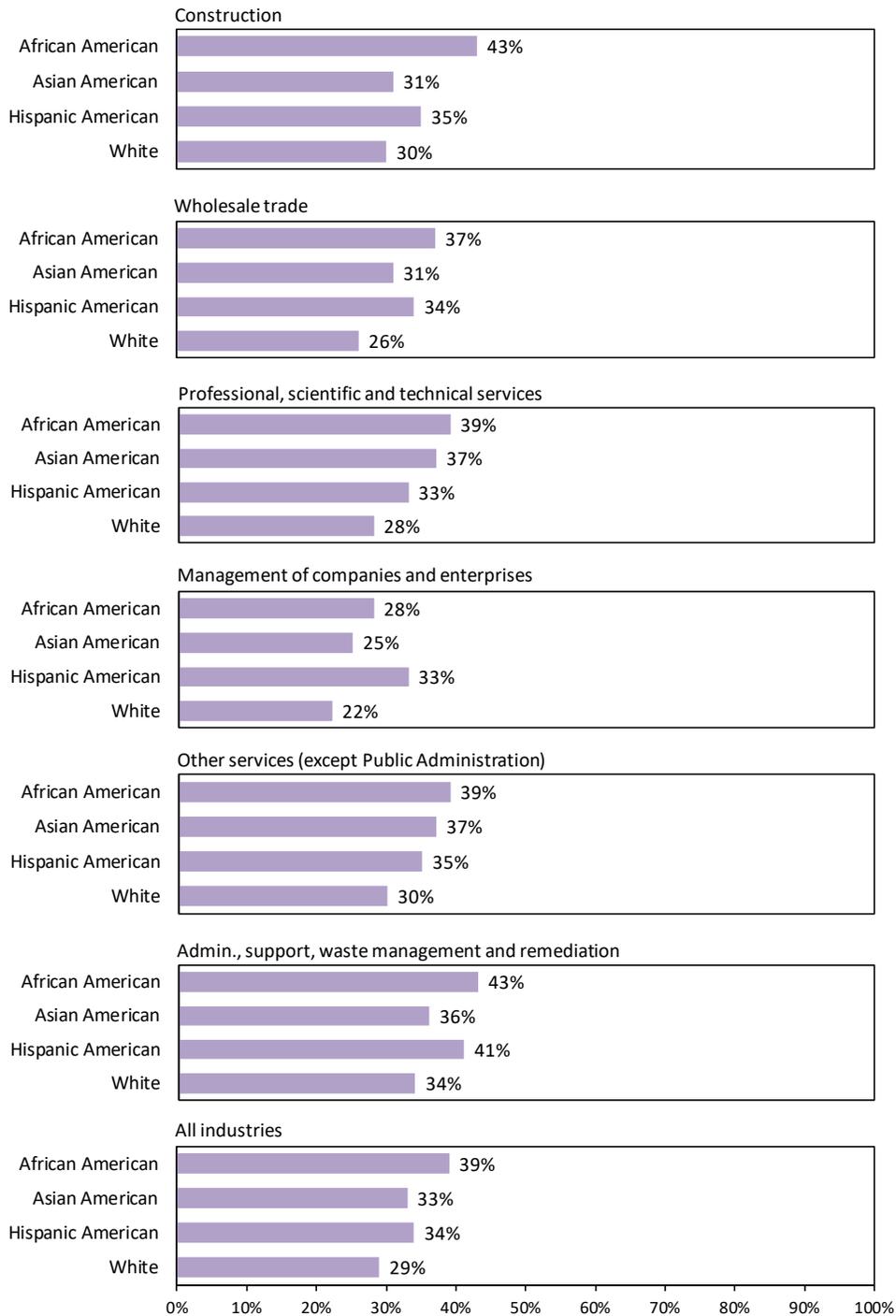
² Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

Rates of business closures by industry. The SBA report also examined national business closure rates by race/ethnicity for 21 different industry classifications (these data are not reported by state). Figure H-2 on the following page compares rates of firm closure for administration, support, waste management and remediation; construction; management of companies and enterprises; other services; professional, scientific and technical services; and wholesale trade. Figure H-2 also presents closure rates for all industries by race/ethnicity.

- Across different industries, minority-owned businesses that were operating in 2002 had higher rates of closure from 2002 to 2006 relative to white-owned businesses.
- African American-owned businesses had the highest rate of closure among all racial/ethnic groups. For all industries, 39 percent of African American-owned firms in business in 2002 had closed by 2006 compared with 29 percent of business owned by whites.
- The study team could not examine whether those differences also existed in Colorado because the SBA analysis by industry was not available for individual states.

Figure H-2.

Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Unsuccessful closures. Not all business closures can be interpreted as “unsuccessful closures.” Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent “successful closures.” Even though data are from years ago, the 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.³ The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, “Which item below describes the status of this business at the time the decision was made to cease operations?” Only the responses “successful” and “unsuccessful” were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction, wholesale trade, services and all industries.^{4, 5}

According to CBO data, African American-owned businesses were the most likely to report being “unsuccessful” at the time at which their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by other minority groups (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction industry, minority- and women-owned businesses were more likely to report unsuccessful business closures (82% and 66%, respectively) than non-Hispanic white male-owned businesses (58%). Those trends were similar in the services industry with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

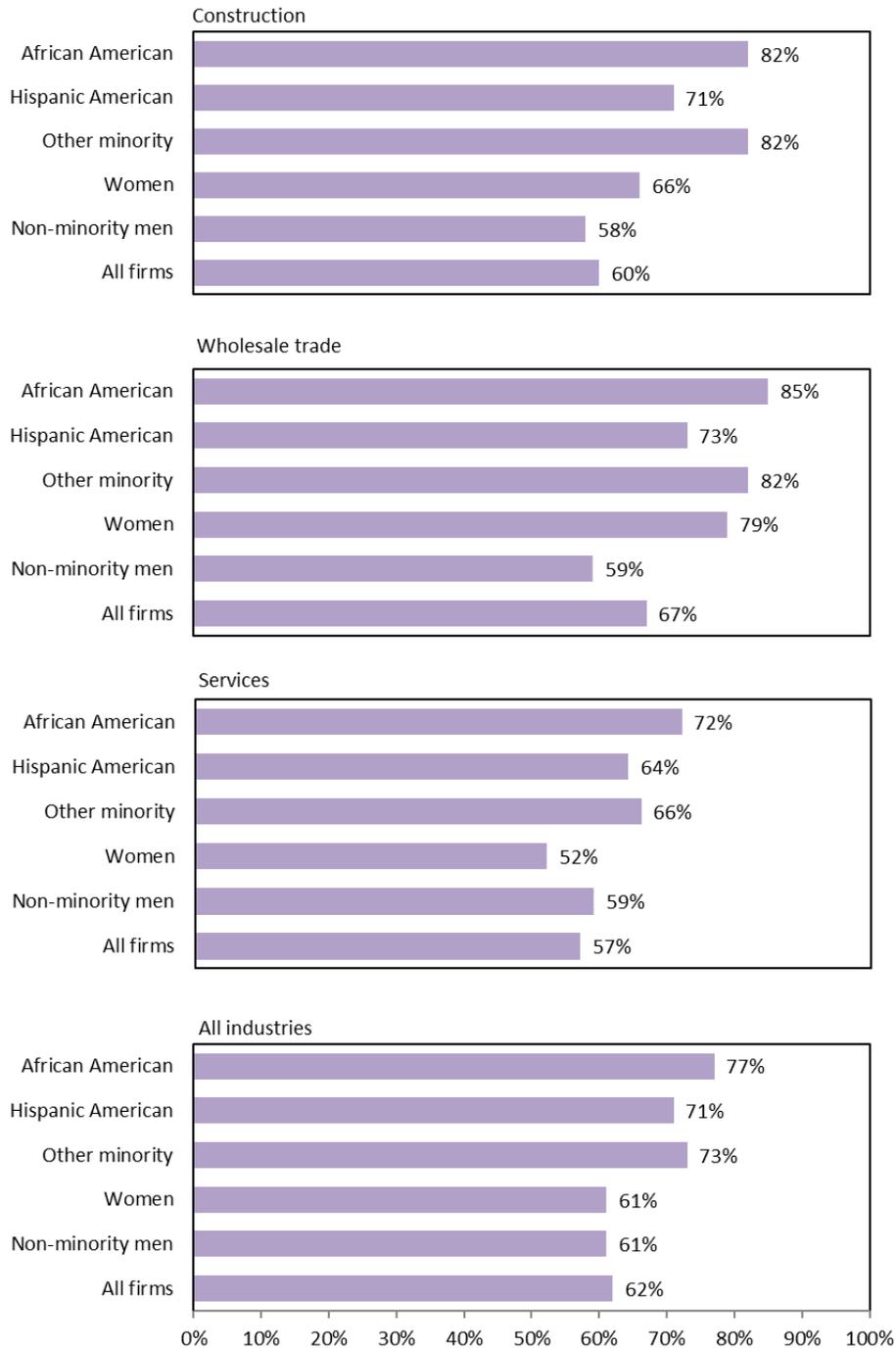
³ CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

⁴ All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. For further explanation, see Holmes, T. J., & Schmitz, J. A. (1996). Nonresponse bias and business turnover rates: The case of the Characteristics of Business Owners Survey. *Journal of Business & Economic Statistics*, 14(2), 231–241; Headd, B. (2001). *Business success: Factors leading to surviving and closing successfully* (Working Paper No. 01-01). Center for Economic Studies, U.S. Census Bureau. Retrieved from the U.S. Census Bureau website: <https://www.census.gov/library/working-papers/2001/adrm/ces-wp-01-01.html>.

⁵ Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

Figure H-3.

Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Business failures of minority-owned businesses may be due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability.⁶ Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is particularly acute for minority-owned businesses in the construction industry.⁷ Access to capital is discussed in more detail in Appendix G.
- Prior work experience in a family member's business or similar experiences are determinants of business viability.⁸ Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.⁹ Similar gaps exist in the likelihood of business survival among women-owned firms.¹⁰
- A business owner's education level is a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and nonminority-owned businesses.¹¹
- Nonminority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a business in a successful manner.¹²
- Possession of greater initial capital and generally higher levels of education among Asian Americans is related to a higher rate of survival of Asian American-owned businesses compared to other minority-owned businesses.¹³

⁶ See, e.g., Fairlie, R. W., & Robb, A. M. (2010). *Disparities in capital access between minority and non-minority-owned businesses: The troubling reality of capital limitations faced by MBEs* (Rep.). Retrieved from Minority Business Development Agency website: <https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf>; Robb, A. M., and Fairlie, R. W. (2009). Determinants of business success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics*, 22(4), 827–858.

⁷ Blanchflower, D. (2008). *Minority self-employment in the United States and the impact of affirmative action programs* (Working paper No. 12972). NBER Working Paper Series. Cambridge, MA: National Bureau of Economic Research. Retrieved from <https://www.nber.org/papers/w13972>

⁸ Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

⁹ Fairlie, R. W., & Robb, A. M. (2007). Why are black-owned businesses less successful than white-owned businesses? The role of families, inheritances and business human capital. *Journal of Labor Economics*, 25(2), 289–323.

¹⁰ Fairlie, R. W., & Robb, A. M. (2009). Gender differences in business performance: Evidence from the Characteristics of Business Owners survey. *Small Business Economics*, 33(4), 375–395.

¹¹ Ibid.; Fairlie, R., & Woodruff, C. M. (2010). Mexican-American entrepreneurship. *The BE Journal of Economic Analysis & Policy*, 10(1).

¹² Bates, T. (2005). Analysis of young, small firms that have closed: Delineating successful from unsuccessful closures. *Journal of Business Venturing*, 20(3), 343–358.

¹³ Robb, A. M., & Fairlie, R. W. (2009). Determinants of business success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics*, 22(4), 827–858; Fairlie, R. W., Zissimopoulos, J., & Krashinsky, H. (2010). The

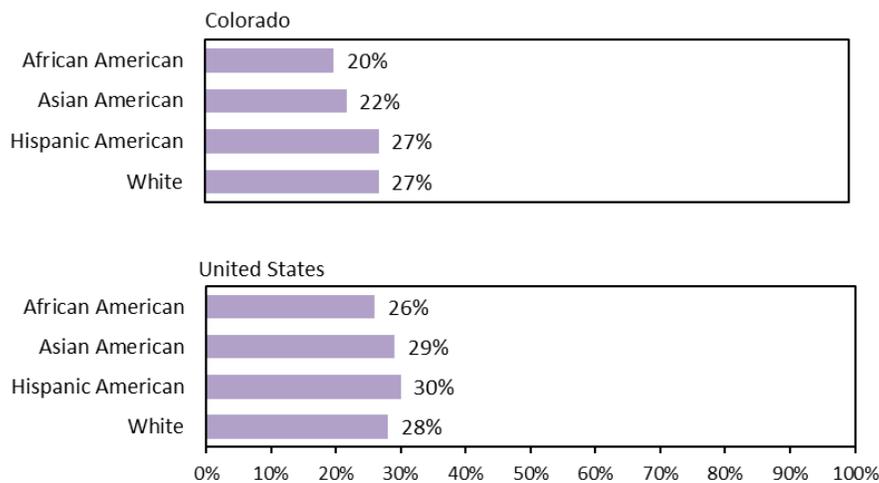
Expansions and contractions. Comparing rates of expansion and contraction between firms owned by different groups is also useful in assessing the success of minority-owned businesses. As with closure data, only some data on expansions and contractions available for the nation were available at the state level.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of privately held Colorado businesses that expanded and contracted between 2002 and 2006.

Figure H-4 presents the percentage of all businesses that increased their total employment between 2002 and 2006. In Colorado, African American-owned businesses (20%) and Asian American-owned businesses (22%) expanded at a lower rate than white-owned businesses (27%).

Figure H-4.

Percentage of businesses that expanded, 2002 through 2006, Colorado and the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

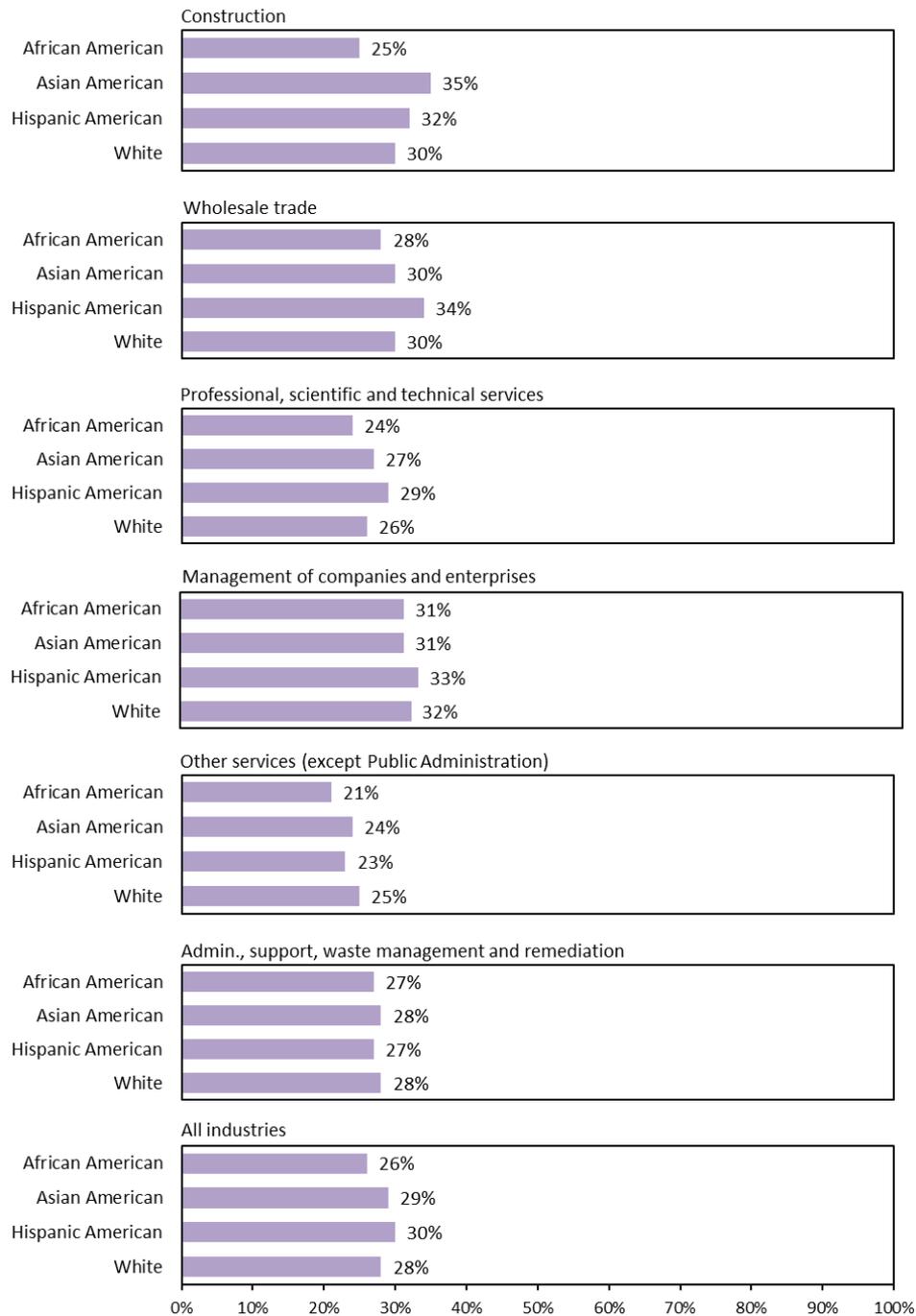
Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation in the United States. (The SBA study did not report results for businesses in individual industries at the state level.)

In each industry examined, a smaller percentage of African American-owned firms expanded compared to white-owned companies. There was no similar pattern of differences in the percentage of firms expanding for Asian American- or Hispanic American-owned firms compared with nonminority-owned businesses.

international Asian business success story? A comparison of Chinese, Indian and other Asian businesses in the United States, Canada and United Kingdom. In *International Differences in Entrepreneurship* (pp. 179–208). University of Chicago Press; Fairlie, R. W., & Robb, A. (2010). *Race and entrepreneurial success: Black-, Asian-, and white-owned businesses in the United States*. Cambridge, MA: The MIT Press.

Figure H-5.
 Percentage of businesses that expanded, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

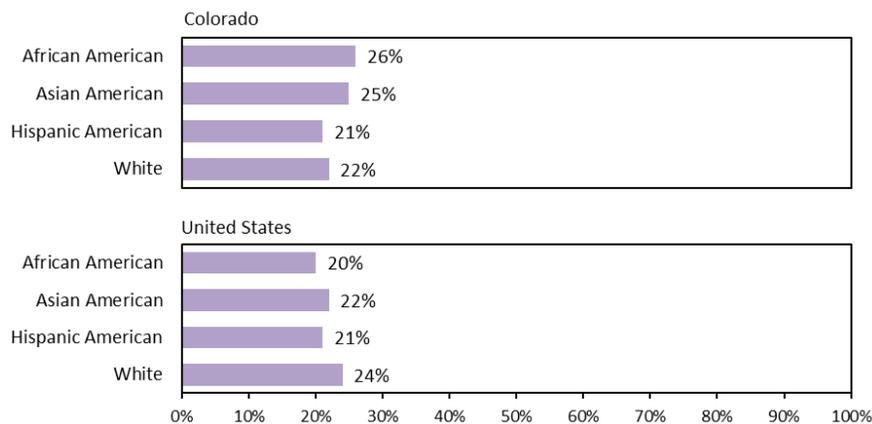
Contraction. Figure H-6 shows the percentage of privately held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Colorado and in the nation.

- African American- and Asian American-owned businesses were more likely than nonminority-owned business to have contracted in 2002 through 2006 in Colorado.
- There was little difference in results for Hispanic American-owned firms compared with white-owned companies.

The results for Colorado differ from those for the United States as a whole. Relatively fewer minority-owned businesses in the nation contracted compared with white-owned companies.

Figure H-6.

Percentage of businesses that contracted, 2002 through 2006, Colorado and the U.S.



Note: Data refer to non-publicly held businesses only.

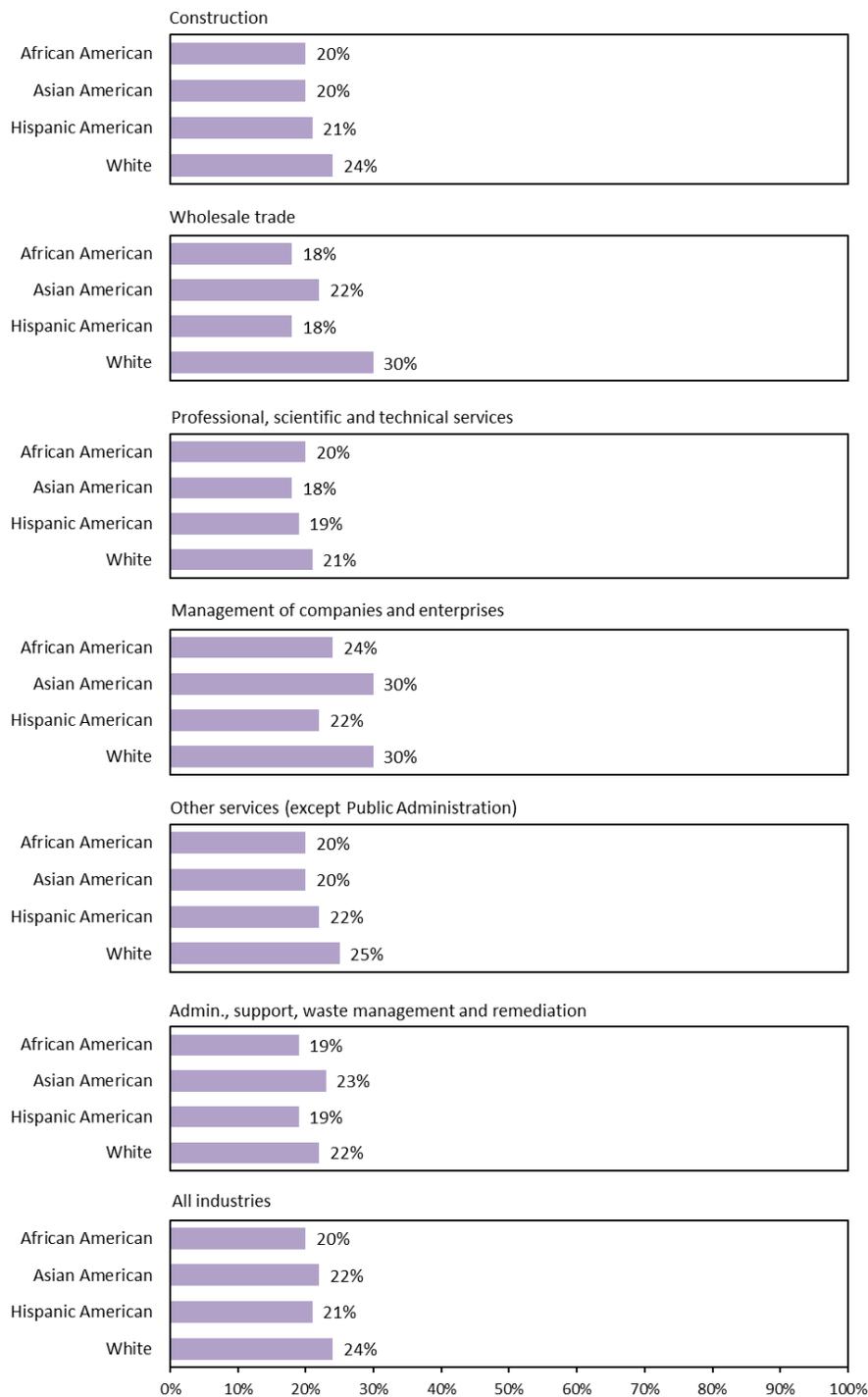
As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010) Race/ethnicity and establishment dynamics, 2002–2006 (Rep. No. 369). U.S. Small Business Administration, Office of Advocacy.

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 displays the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

Industry-level patterns likely differ for Colorado since Figure H-6 showed a higher percentage of African American- and Asian American-owned firms contracting for all industries combined.

Figure H-7.
Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only.

As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002–2006. U.S. Small Business Administration Office of Advocacy.

B. Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2014–2018 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Colorado market area that the study team collected as part of the 2020 availability surveys.

Business receipts. The study team examined receipts for businesses using data from the 2012 SBO, conducted by the U.S. Census Bureau. The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (with paid employees other than owner and family members) and all businesses.¹⁴ SBO data do not include information about firms owned by persons with disabilities or LGBT individuals.

Receipts for all businesses. Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender.¹⁵ The SBO data across all industries in Colorado show receipts for minority- and women-owned businesses lower than for non-Hispanic-owned, white-owned or male-owned businesses.

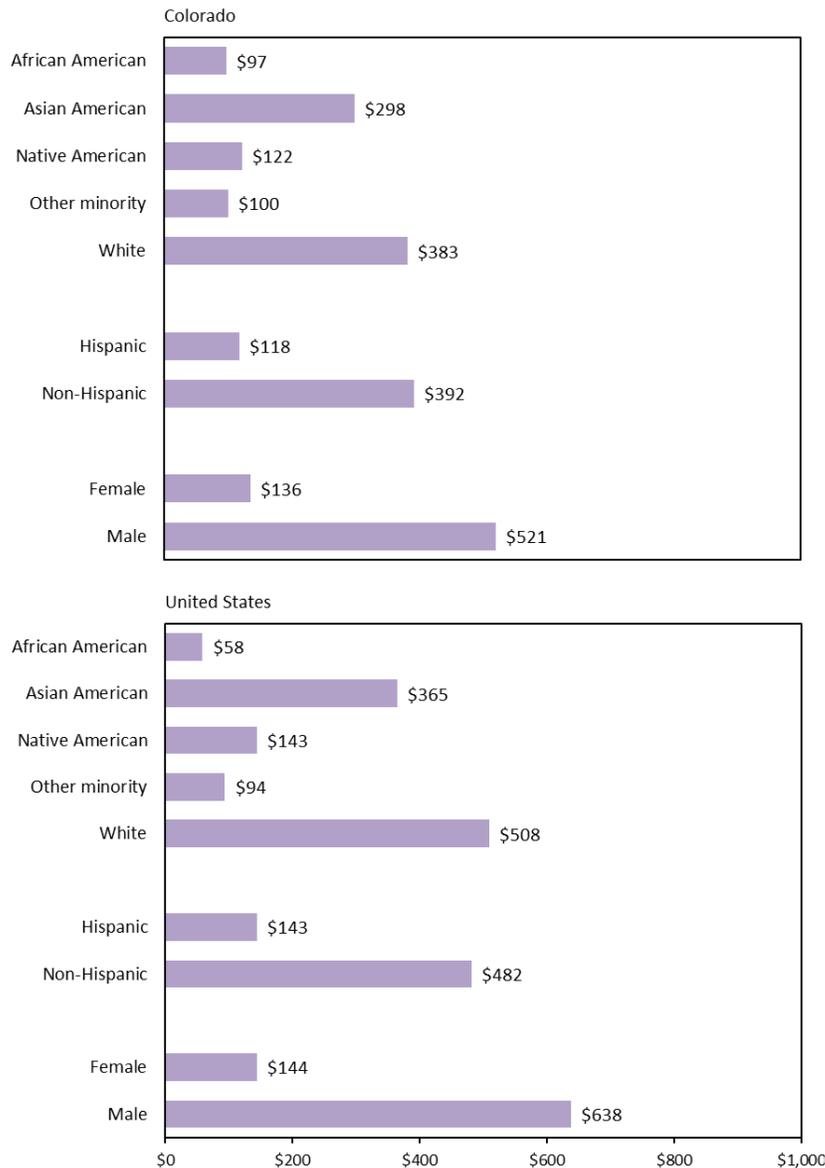
- Average receipts of African American-owned businesses (\$97,000) were about one quarter that of white-owned businesses (\$383,000).
- Native American-owned businesses' average annual receipts (\$122,000) were about one third that of white-owned businesses.
- Hispanic-owned businesses (\$118,000) had revenues that were about one-third of the average of non-Hispanic-owned businesses (\$392,000).
- Average receipts for female-owned businesses (\$136,000) were about one-quarter of receipts for male-owned businesses (\$521,000).

As shown in Figure H-8, the patterns of disparities for minority- and women-owned businesses for Colorado are similar to those for the nation.

¹⁴ Keen Independent uses “all businesses” to denote SBO data used in this analysis. Data include incorporated and unincorporated businesses, but not publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

¹⁵ Racial categories are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans.

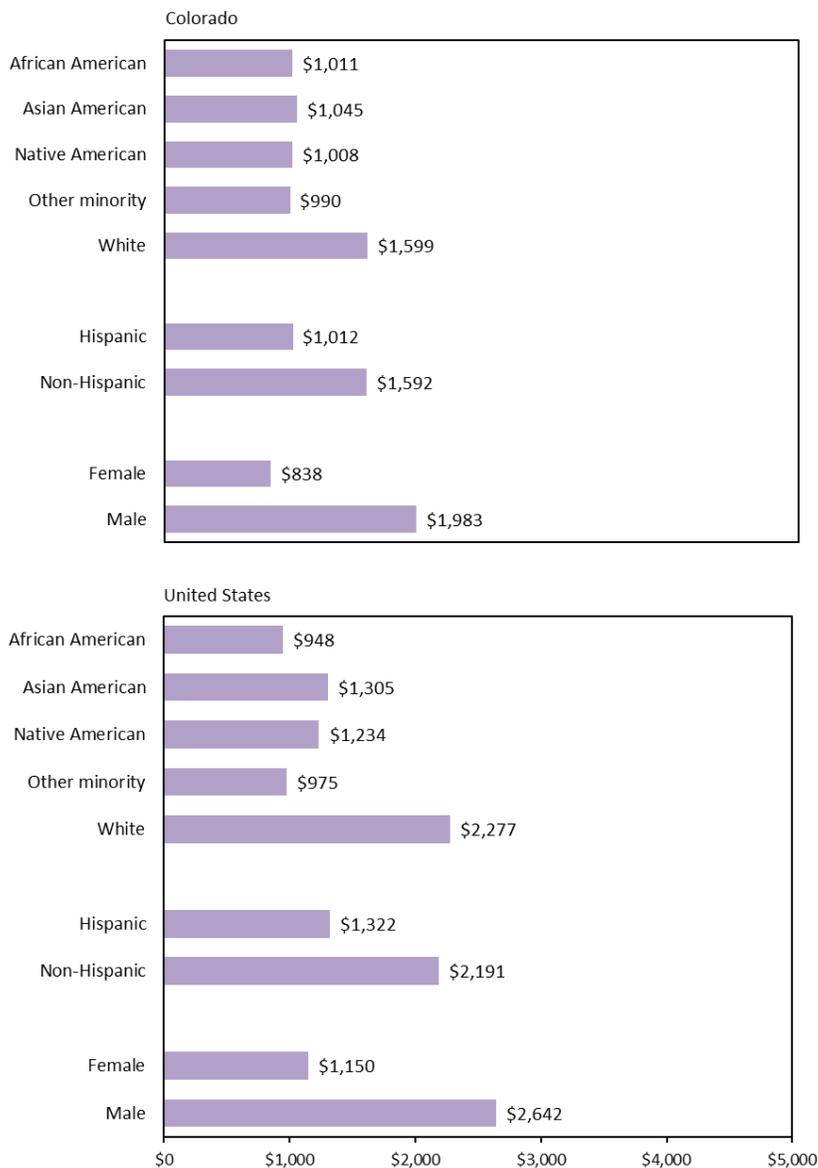
Figure H-8.
Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012



Note: Includes employer and non-employer businesses. Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
 As sample sizes are not reported, statistical significance of these results cannot be determined.
Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure H-9 presents average annual receipts in 2012 for employer businesses (firms with paid employees). In both Colorado and in the United States, minority- and women-owned businesses had lower average business receipts than white- and male-owned employer businesses. For example, average receipts for African American-owned employer businesses in Colorado (\$1 million) were about 60 percent of white-owned businesses (\$1.6 million).

Figure H-9.
Mean annual receipts (thousands) for employer businesses,
by race/ethnicity and gender of owners, 2012



Note: Includes only employer businesses.
 Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
 As sample sizes are not reported, statistical significance of these results cannot be determined.

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

Receipts by industry. The study team also analyzed SBO receipts data for businesses in construction, construction-related professional services, other professional services, goods, other services and brokerage and investment. Figure H-10 presents mean annual receipts in 2012 for firms in the economic sectors that correspond to the study industries. Figure H-11 shows results for businesses with paid employees. Disparities for minority- and women-owned businesses seen in all industries combined (Figure H-8) persist when examining results for most industries.

Figure H-10.
 Mean annual receipts (thousands) for all firms in the relevant study industries,
 by race/ethnicity and gender of owners, 2012, United States

Demographic group	Construction	Architectural, engineering and related services	Professional, scientific and technical services	Wholesale trade	Other services	Securities, commodity contracts and other financial investments
Colorado						
Race						
African American	\$ 180	\$ 788	\$ 148	\$ 1,083	\$ 20	\$ 64
Asian American	101	894	208	2,649	64	151
Native American	228	197	78	1,609	27	13
Other minority	79	233	151	961	31	N/A
White	426	387	198	3,578	84	294
Ethnicity						
Hispanic	\$ 115	\$ 454	\$ 160	\$ 701	\$ 37	\$ 90
Non-Hispanic	458	400	200	3,636	84	296
Gender						
Female	\$ 303	\$ 325	\$ 104	\$ 1,153	\$ 35	\$ 130
Male	418	435	262	4,497	108	360
United States						
Race						
African American	\$ 81	\$ 163	\$ 76	\$ 529	\$ 17	\$ 141
Asian American	200	484	245	2,654	59	267
Native American	215	261	110	930	41	165
Other minority	86	208	105	852	30	137
White	455	461	235	4,422	94	469
Ethnicity						
Hispanic	\$ 117	\$ 238	\$ 121	\$ 1,502	\$ 37	\$ 165
Non-Hispanic	467	465	235	4,289	80	459
Gender						
Female	\$ 350	\$ 300	\$ 104	\$ 1,778	\$ 32	\$ 131
Male	415	491	301	5,060	111	570

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.
 As sample sizes are not reported, statistical significance of these results cannot be determined.
 "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

Figure H-11.

Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012, United States

Demographic group	Construction	Architectural, engineering and related services	Professional, scientific and technical services	Wholesale trade	Other services	Securities, commodity contracts and other financial investments
Colorado						
Race						
African American	\$ N/A	\$ 2,342	\$ 868	\$ 4,683	\$ 329	\$ 206
Asian American	828	2,317	849	6,601	300	N/A
Native American	1,545	503	500	4,189	160	N/A
Other minority	525	N/A	2,454	11,284	262	N/A
White	1,462	949	732	7,742	466	1,123
Ethnicity						
Hispanic	\$ 789	\$ 1,952	\$ 1,318	\$ 4,873	\$ 328	\$ 980
Non-Hispanic	1,493	978	728	7,787	460	1,117
Gender						
Female	\$ 1,104	\$ 1,306	\$ 532	\$ 4,157	\$ 248	\$ 512
Male	1,624	1,042	877	8,876	536	1,267
United States						
Race						
African American	\$ 1,096	\$ 1,721	\$ 816	\$ 5,134	\$ 321	\$ 1,646
Asian American	1,223	1,795	1,154	5,061	275	1,237
Native American	1,327	1,082	700	5,374	387	34
Other minority	839	2,143	1,139	3,764	326	1,258
White	1,730	1,420	983	9,774	564	2,169
Ethnicity						
Hispanic	\$ 1,005	\$ 1,475	\$ 865	\$ 5,431	\$ 383	\$ 854
Non-Hispanic	1,749	1,452	999	9,367	528	2,166
Gender						
Female	\$ 1,561	\$ 1,278	\$ 620	\$ 6,471	\$ 293	\$ 722
Male	1,842	1,570	1,167	10,421	636	2,475

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined.

"N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

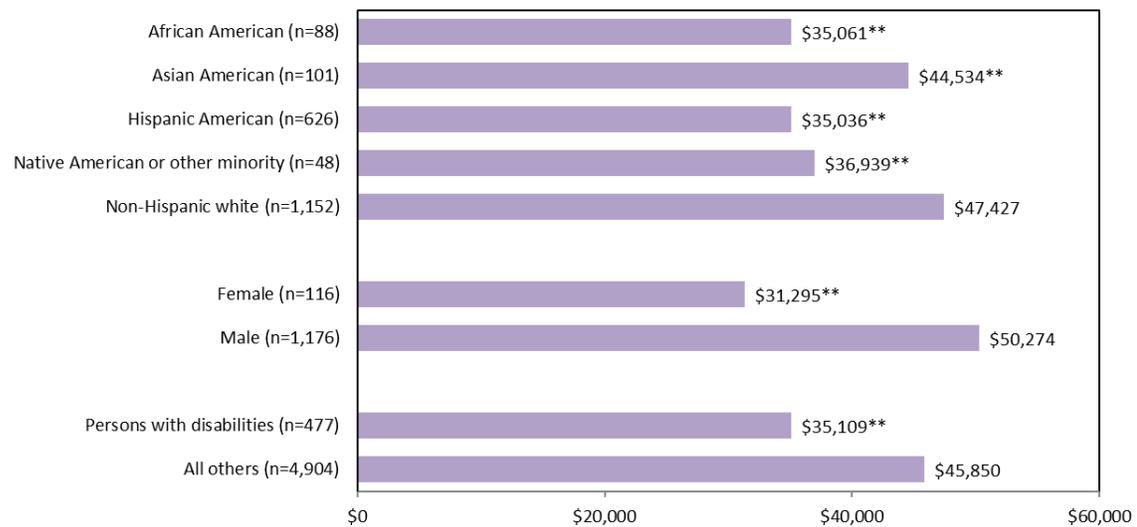
Business earnings. To assess the success of self-employed minorities, women and persons with disabilities in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2014–2018 ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. All results are presented in 2018 dollars.

All study industries. Figure H-12 shows mean annual business owner earnings for 2014 through 2018 for relevant study industries by race/ethnicity, gender and disability status.

On average, earnings for business owners in Colorado who were Hispanic American, African American, Asian American or Native American were less than earnings for non-Hispanic white business owners (\$47,427). Average earnings for female business owners (\$31,295) were less than those of male business owners (\$50,274). Average earnings for businesses owned by persons with disabilities (\$35,109) were also lower than all others (\$45,850). These differences were statistically significant.

Figure H-12.

Mean annual business owner earnings in all study industries, 2014 through 2018, Colorado



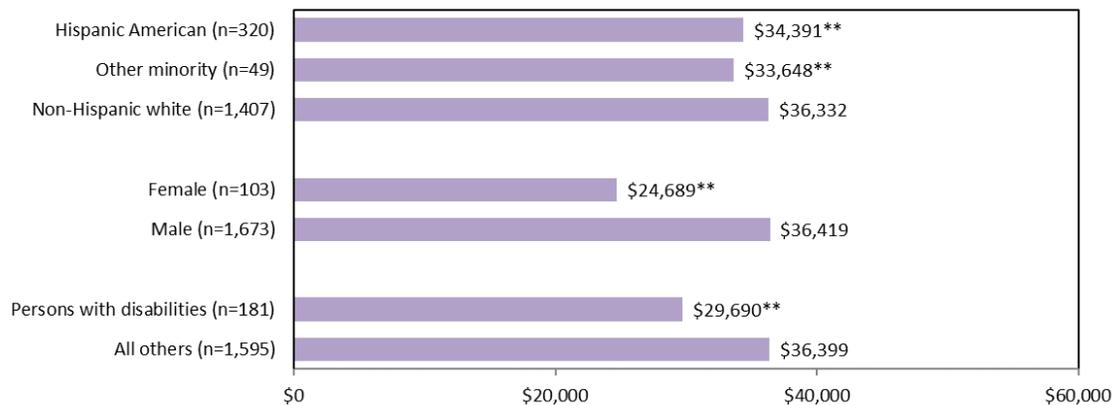
Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Construction. Figure H-13 shows similar earnings patterns in the Colorado construction industry. The figure presents the mean annual business owner earnings for construction by race/ethnicity, gender and disability status. Note that results for African Americans, Asian Americans, Native Americans and others were combined into a single “other minority” category due to small sample sizes.

Construction businesses owned by people of color, women and persons with disabilities showed lower earnings than those owned by non-minorities, men and persons without disabilities, respectively. Each of these differences was statistically significant.

Figure H-13.
Mean annual business owner earnings in the construction industry, 2014 through 2018, Colorado



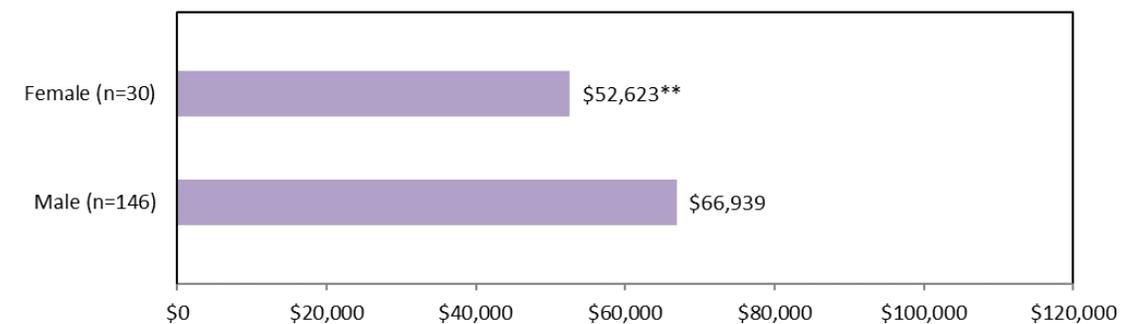
Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. "Other minority" includes African Americans, Asian Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Construction-related professional services. Figure H-14 shows mean annual business owner earnings for 2014 through 2018 for construction-related professional services by gender. Results by race/ethnicity and disability status are not presented due to small sample sizes.

On average, earnings for female business owners (\$52,623) were less than those of male business owners (\$66,939) in the Colorado construction-related professional services industry. This difference was statistically significant.

Figure H-14.
Mean annual business owner earnings in the construction-related professional services industry, 2014 through 2018, Colorado



Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Other professional services. Mean annual business owner earnings for other professional services are illustrated in Figure H-15. Note that results for African American and Native American business owners were combined into a single "other minority" category due to small sample size.

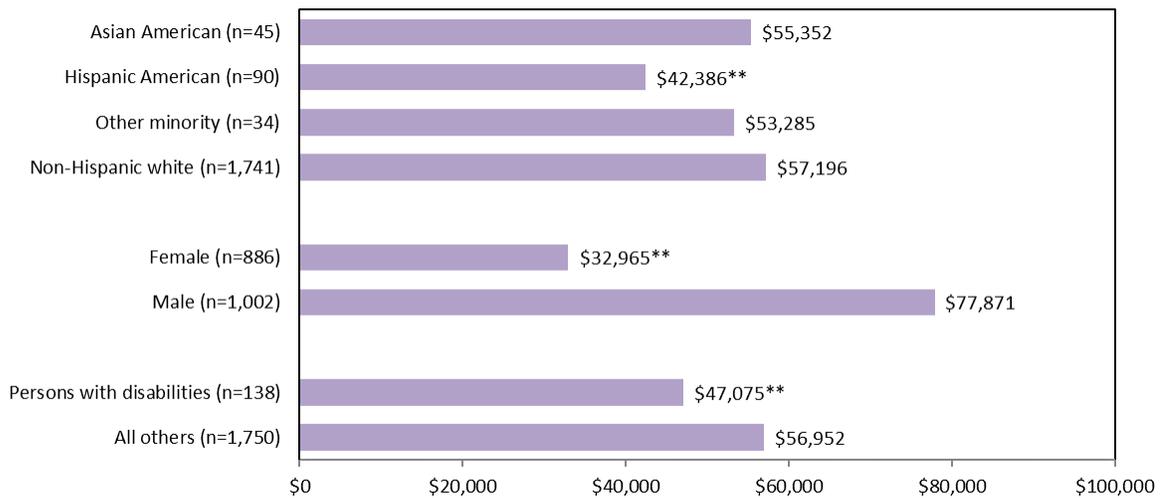
In the Colorado other professional services industry:

- Hispanic American business owners (\$42,386) had lower average earnings than non-Hispanic white business owners (\$57,196);
- Female business owners showed average earnings considerably less than their male counterparts (\$32,965 and \$77,871, respectively); and
- Persons with disabilities reported lower earnings than other business owners (\$47,075 and \$56,952, respectively).

Each of the above differences was statistically significant. Asian American business owners and other minority business owners reported lower average earnings than non-Hispanic white business owners, but these differences were not statistically significant.

Figure H-15.

Mean annual business owner earnings in other professional services, 2014 through 2018, Colorado



Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. "Other minority" includes African Americans, Native Americans and other minorities.

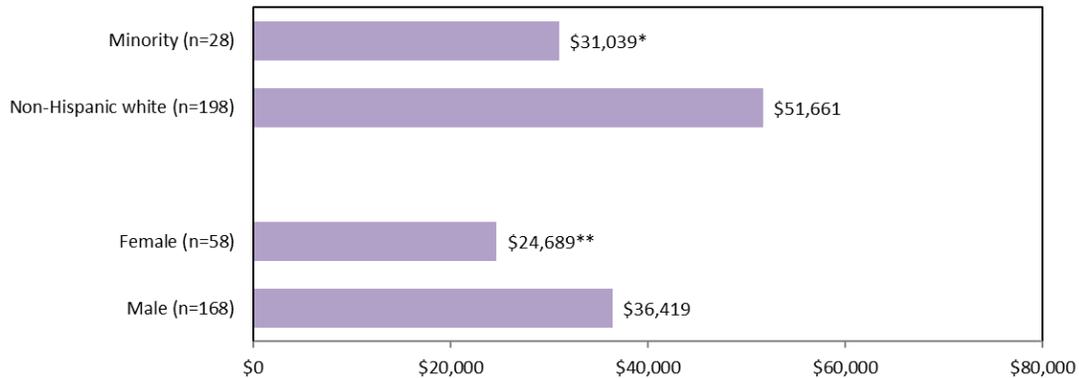
Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Goods. Figure H-16 shows mean annual business owner earnings for 2014 through 2018 for the goods industry by minority status and gender. Note that results for businesses owned by people of color were combined into a single category due to small sample sizes. The study team could not analyze business owner earnings for persons with disabilities due to small sample size.

Minority business owners (\$31,039) reported annual earnings about \$20,000 less than non-Hispanic white business owners (\$51,661). Likewise, average earnings for female business owners in the good industry (\$24,689) were about \$12,000 less than those of male business owners (\$36,419). These differences were statistically significant.

Figure H-16.

Mean annual business owner earnings in goods, 2014 through 2018, Colorado



Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

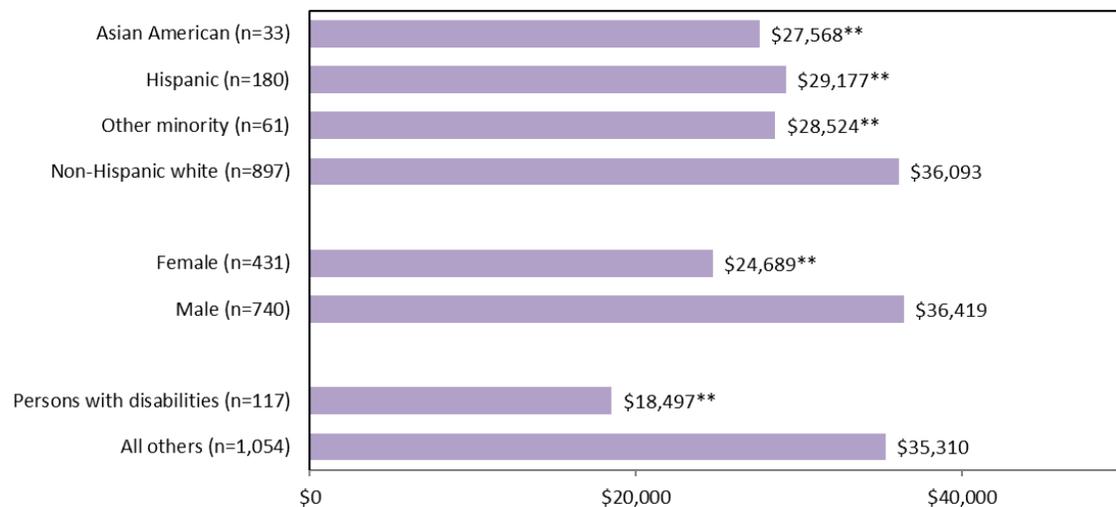
Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Other services. Figure H-17 shows mean annual business owner earnings for 2014 through 2018 for owners of other services businesses. Note that African Americans, Native Americans and other minorities were combined into a single “other minority” category due to small sample sizes.

On average, minority business owners reported earnings of about \$7,000 to \$9,000 lower than non-Hispanic white business owners (\$36,093). Average earnings for female business owners (\$24,689) were about \$12,000 below those of male business owners (\$36,419). Average earnings for business owners living with a disability (\$18,497) were about half of the average earnings for those living without a disability (\$35,310). Each of these differences was statistically significant.

Figure H-17.

Mean annual business owner earnings in other services, 2014 through 2018, Colorado



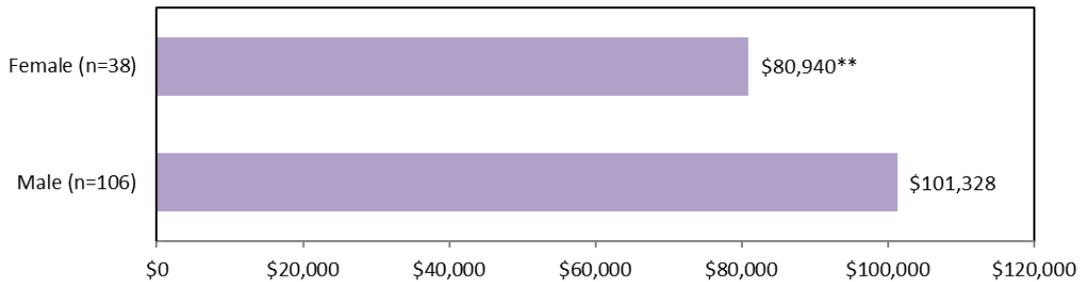
Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. “Other minority” includes African Americans, Native Americans and other minorities.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Brokerage and investment. Figure H-18 shows mean annual business owner earnings for 2014 through 2018 for female business owners (\$80,940) and male business owners (\$101,328). This difference was statistically significant. No results could be reported for other groups due to small sample sizes.

Figure H-18.

Mean annual business owner earnings in brokerage and investment, 2014 through 2018, Colorado



Note: ** Denotes statistically significant differences between groups at the 95% confidence level. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source: Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Regression analysis of business earnings. Differences in business earnings among different groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created statistical models through regression analysis to examine whether there were differences in average business earnings between people of color and non-Hispanic whites, women and men, and persons with disabilities and all others after accounting for certain neutral factors. Data came from the ACS for Colorado between 2014 and 2018.

The study team applied ordinary least squares regression models to the data that were very similar to models reviewed by courts after other disparity studies.¹⁶ The dependent variable in each 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, gender and disability status of business owners, the model also included measures of factors that are likely to affect earnings, including age, marital status, ability to speak English well and educational attainment.

¹⁶ For example, National Economic Research Associates, Inc. (2012). *The state of minority- and women-owned business enterprise in construction: Evidence from Houston* (Rep.). Retrieved from City of Houston website: <http://www.houstontx.gov/obo/disparitystudyfinalreport.pdf>; BBC Research & Consulting. (2012). *Availability and disparity study* (Rep.). Retrieved from the California Department of Transportation website: <https://dot.ca.gov/-/media/dot-media/documents/2012-caltrans-availability-and-disparity-study-a11y.pdf>

The study team developed models for business owner earnings in 2014 through 2018 for the following Colorado industries:

- A model for business owner earnings in the construction industry that included 1,776 observations;
- A model for business owner earnings in the construction-related professional services industry that included 176 observations;
- A model for business owner earnings in the other professional services industry that included 1,888 observations;
- A model for business owner earnings in the goods industry that included 226 observations;
- A model for business owner earnings in the other services industry that included 1,171 observations; and
- A model for business owner earnings in the brokerage and investment industry that included 144 observations.

Construction industry regression results. Figure H-19 includes coefficient estimates for the construction industry regression model in the 2014–2018 Colorado marketplace. The significance level of the coefficients suggest that race/ethnicity is not a significant predictor of average business earnings after accounting for race- and gender-neutral factors.

Gender and disability status are significant predictors of average earnings, with both females and persons with disabilities associated with lower business owner earnings. Both relationships were statistically significant.

Figure H-19.
Mean annual business owner earnings in construction, 2014 through 2018, Colorado

Note:

*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. "Other minority" includes African Americans, Asian Americans, Native Americans and other minorities.

Source:

Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.850 **
Age	0.093 **
Age-squared	-0.001 **
Married	0.351 **
Disability status	-0.366 **
Speaks English well	0.111
Less than high school	-0.222 *
Some college	-0.058
Four-year degree	-0.051
Advanced degree	-0.022
Hispanic American	0.130
Other minority	0.103
White female	-0.381 **

Construction-related professional services industry regression results. Figure H-20 includes coefficient estimates for the construction-related professional services industry regression model in the 2014–2018 Colorado marketplace.

Gender was a significant predictor of average earnings in the construction-related professional services industry. Businesses owned by white women report earnings lower than businesses owned by white men, on average, after accounting for gender-neutral factors such as age and education.

Minority or disability status were not significant predictors of business earnings after accounting for other factors.

Figure H-20.
Mean annual business owner earnings in construction-related professional services, 2014 through 2018, Colorado

Note:
 *,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source:
 Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.382 **
Age	0.161 **
Age-squared	-0.002 **
Married	-0.082
Disability status	-0.187
Speaks English well	0.000
Less than high school	-0.605
Some college	-0.694
Four-year degree	-0.337
Advanced degree	-0.230
Minority	0.129
White female	-0.433 **

Other professional services industry regression results. Figure H-21 presents coefficient estimates for the other professional services regression model in the 2014–2018 Colorado marketplace. Model results indicate that some racial and ethnic groups have lower average business earnings after accounting for race- and gender-neutral factors.

African Americans, Native Americans and other minorities were combined into a single “other minority” category due to low sample size. Business owners in this group, as well as Hispanic Americans, had lower average earnings than non-Hispanic whites. These differences were statistically significant.

After statistically controlling for certain personal characteristics, white women business owners in the industry were found to have lower average earnings than their white male counterparts. This difference was statistically significant.

Disability status was not a significant predictor of earnings after accounting for other factors.

Figure H-21.
Mean annual business owner earnings in other professional services, 2014 through 2018, Colorado

Note:

*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. "Other minority" includes African Americans, Native Americans and other minorities.

Source:

Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.589 **
Age	0.119 **
Age-squared	-0.001 **
Married	-0.034
Disability status	-0.198
Speaks English well	-0.304
Less than high school	0.482
Some college	0.194
Four-year degree	0.428 **
Advanced degree	0.631 **
Asian American	-0.142
Hispanic American	-0.481 **
Other minority	-0.602 *
White female	-0.817 **

Goods industry regression results. Figure H-22 includes coefficient estimates for the goods regression model in the 2014–2018 Colorado marketplace. All business owners of color were grouped into a single minority business owner category due to small sample size.

The results of this model indicate that after controlling for certain personal characteristics, minority business owners reported lower earnings than non-Hispanic white business owners, although this difference was not statistically significant.

After controlling for age, education and other personal characteristics, women-owned businesses had lower average business owner earnings than firms owned by men in the industry (statistically significant difference). Disability status was not a significant predictor of earnings in the goods industry after accounting for other factors.

Figure H-22.
Mean annual business owner earnings in goods, 2014 through 2018, Colorado

Note:

*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively. The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source:

Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	6.496 **
Age	0.120 **
Age-squared	-0.001 *
Married	0.090
Disability status	-0.624
Speaks English well	0.763
Less than high school	-0.426
Some college	-0.428
Four-year degree	0.353
Advanced degree	-0.147
Minority	-0.662
White female	-1.091 **

Other services industry regression results. Figure H-23 includes coefficient estimates for the other services regression model in the 2014–2018 Colorado marketplace.

After statistically controlling for certain personal characteristics, average earnings of other service firms owned by women and persons with disabilities were lower than businesses owned by men or persons without a disability. These coefficient estimates are statistically significant.

After accounting for race-neutral factors, race/ethnicity was not a significant predictor of average earnings for businesses providing other services.

Figure H-23.
Mean annual business owner earnings in other services, 2014 through 2018, Colorado

Note:

*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars. "Other minority" includes African Americans, Native Americans and other minorities.

Source:

Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	5.599 **
Age	0.203 **
Age-squared	-0.002 **
Married	0.158
Disability status	-0.484 **
Speaks English well	-0.731 **
Less than high school	-0.216
Some college	0.236
Four-year degree	0.269 *
Advanced degree	-0.287
Asian American	-0.249
Hispanic American	-0.202
Other minority	-0.163
White female	-0.637 **

Brokerage and investment industry regression results. Figure H-24 presents the estimates for the other services regression model in the 2014–2018 Colorado marketplace. Note that all minority business owners were grouped together due to small sample size.

According to 2014–2018 ACS data, minority status, gender and disability status were not significant predictors of average business earnings after accounting for certain personal characteristics. Significant predictors in this industry include a business owners’ age, education and ability to speak English well.

Figure H-24.
Mean annual business owner earnings in brokerage and investment, 2014 through 2018, Colorado

Note:
*,** Denote statistically significant differences between groups at the 90% and 95% confidence level, respectively.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2018 dollars.

Source:
Keen Independent Research from 2014–2018 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	8.199 **
Age	0.189 *
Age-squared	-0.002 **
Married	0.0211
Disability status	0.288
Speaks English well	-2.192 **
Less than high school	-4.430 **
Some college	-0.686
Four-year degree	-0.147
Advanced degree	0.515
Minority	1.078
White female	-0.173

LGBT community. The ACS does not include data sexual orientation or gender identity.

Gross revenue of firms from availability surveys. As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone surveys the study team conducted in spring 2020 (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous five years. Availability survey results pertain to firms indicating qualifications and interest in public sector work in Colorado.

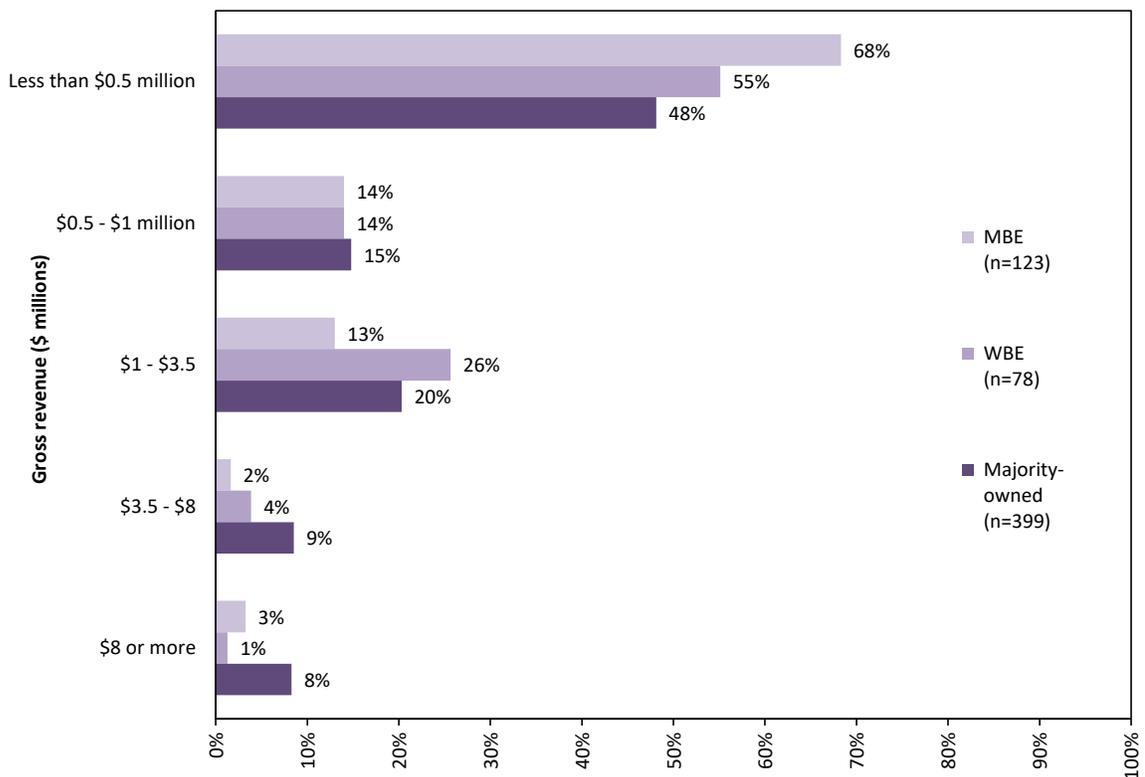
The availability survey encompasses firms working in the construction, construction-related professional services, other professional services, goods and other services industries. Because Keen Independent used a different approach to examining availability for brokerage and investment companies, no survey results were produced for this industry.

Construction. Figure H-25 presents the reported annual revenue for MBE, WBE and majority-owned construction businesses in the Colorado availability surveys. Minority- and women-owned construction firms in Colorado generally reported lower revenue than majority-owned companies.

- MBEs (68%) and WBEs (55%) were more likely than majority-owned firms (48%) to report average revenue of less than \$0.5 million per year.
- After combining the highest two revenue categories, relatively few MBEs (5%) and WBEs (5%) reported average revenue of \$3.5 million or more per year compared with 17 percent of majority-owned businesses.

Figure H-25.

Average annual gross revenue of company over previous five years, Colorado construction industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

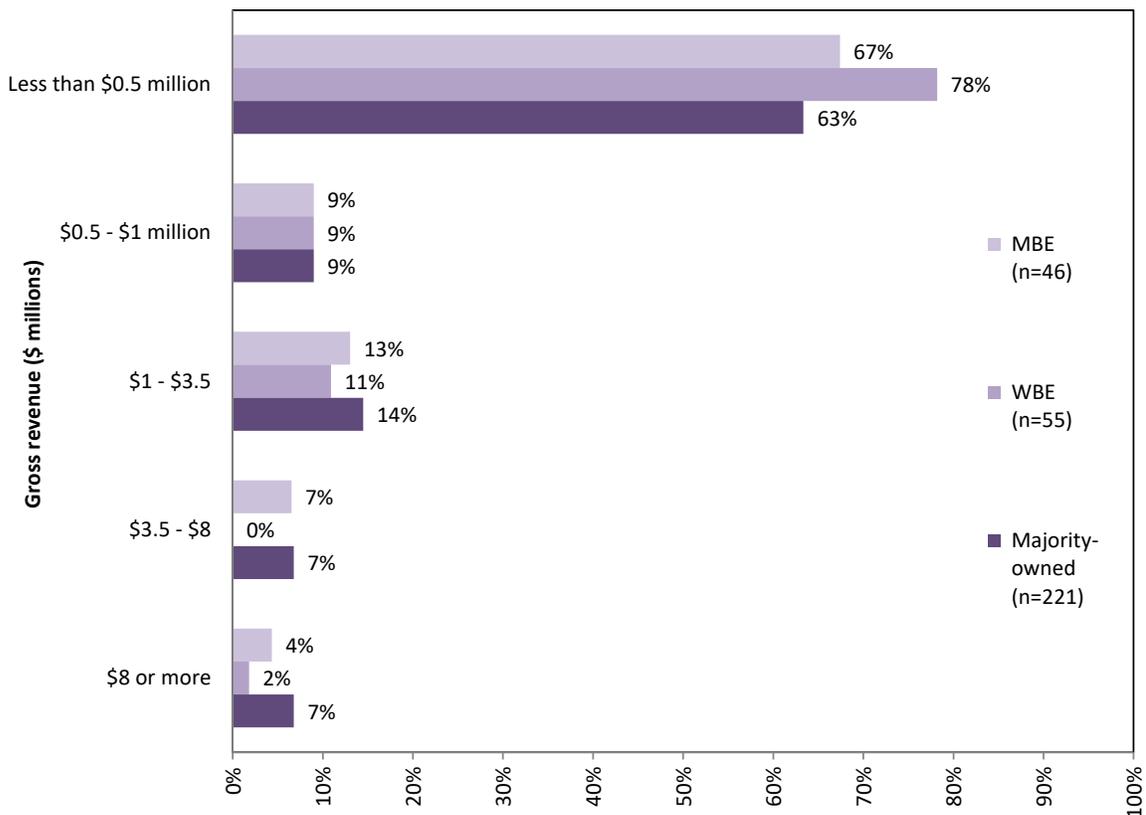
According to data from the availability survey, construction firms owned by persons with disabilities tended to have lower annual revenue than all other firms. About 63 percent of construction firms owned by persons with disabilities reported annual gross revenue of less than \$0.5 million, while 53 percent of other construction firms reported revenue in that range.

Construction-related professional services. Figure H-26 presents the reported annual revenue for construction-related professional service businesses in Colorado.

- WBE firms (78%) and MBE firms (67%) were relatively more likely to report average revenue of less than \$0.5 million per year compared with majority-owned firms (63%).
- Relatively few MBEs (4%) and WBEs (2%) reported average revenue of more than \$8 million per year compared with majority-owned businesses (7%).

Figure H-26.

Average annual gross revenue of company over previous five years,
Colorado construction-related professional services industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

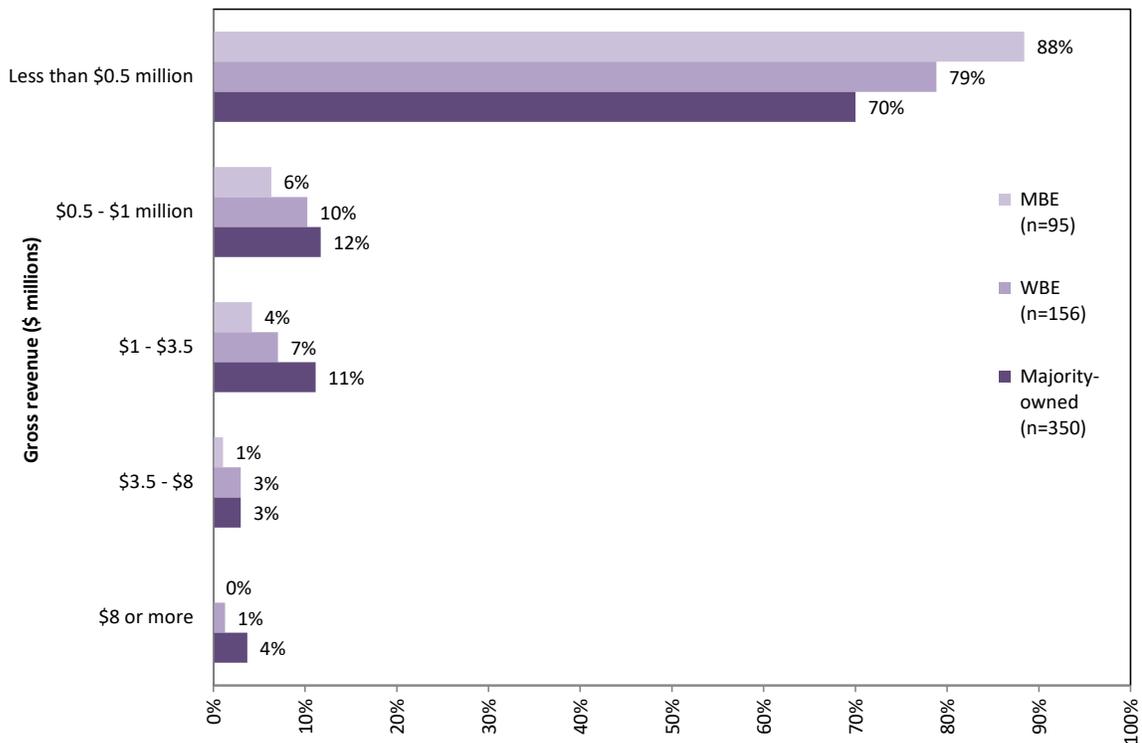
Source: Keen Independent Research from 2020 availability surveys.

In the construction-related professional services industry, about two-thirds of businesses owned by persons with disabilities and all other firms reported annual revenue of less than \$0.5 million. However, in this industry no firms owned by persons with disabilities that were surveyed reported revenue of more than \$3.5 million, while 12 percent of other companies in the industry reported such revenues.

Other professional services. Figure H-27 presents the reported annual revenue for firms surveyed in other professional services sectors.

Most firms in the industry reported annual gross revenue of less than \$0.5 million. Relatively more MBEs (88%) and WBEs (79%) reported revenue less than \$0.5 million than majority-owned companies (70%).

Figure H-27.
Average annual gross revenue of company over previous five years,
Colorado other professional services industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

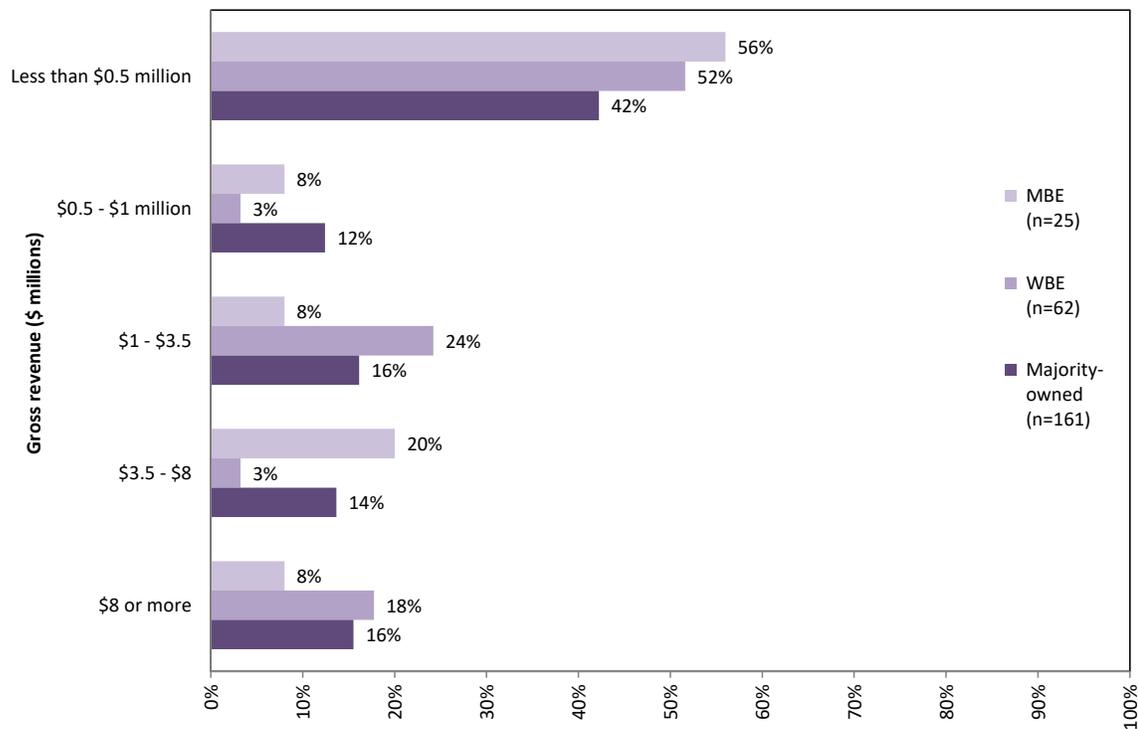
Source: Keen Independent Research from 2020 availability surveys.

Among other professional service firms, 81 percent of those owned by persons with disabilities reported average revenue of less than \$0.5 million, compared with 75 percent of other businesses in the industry.

Goods. Figure H-28 presents the reported annual revenue for goods businesses in Colorado. Compared with other industries surveyed, a greater share of goods firms indicated annual revenue above \$0.5 million.

- Even so, relatively more MBEs (56%) and WBEs (52%) were below \$0.5 million in revenue than majority-owned firms (42%).
- About 18 percent of WBEs and 16 percent of majority-owned businesses indicated annual revenue more of \$8 million or more. Only 8 percent of MBEs reported this level of annual revenue.

Figure H-28.
Average annual gross revenue of company over previous three years,
Colorado goods industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

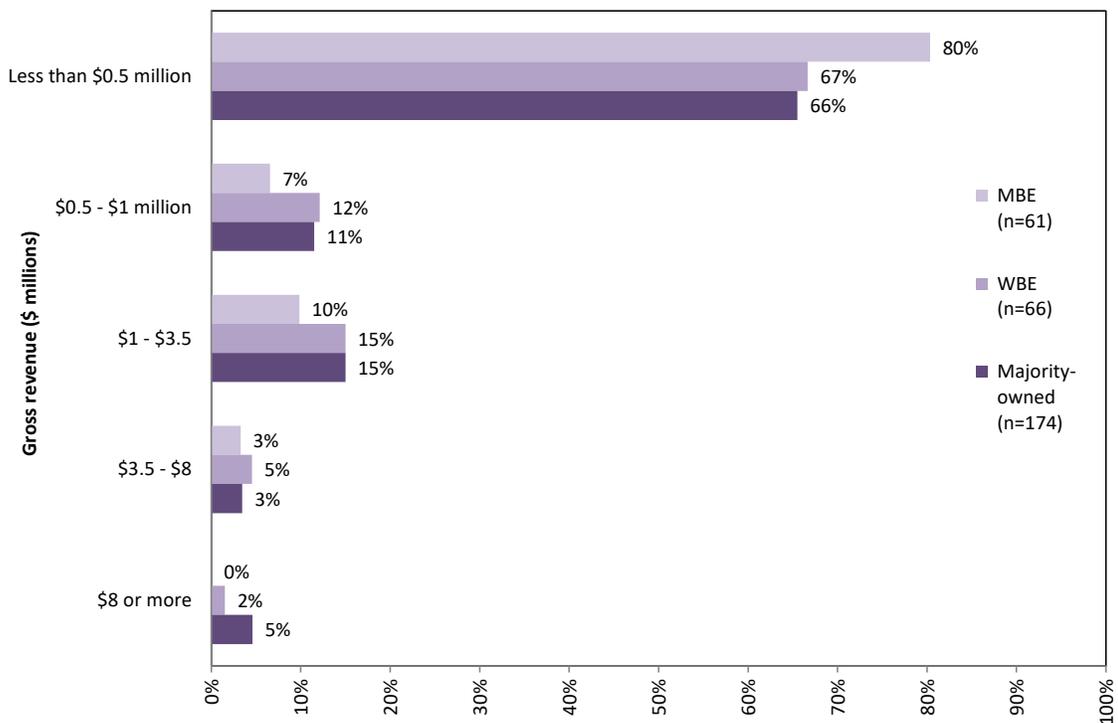
Source: Keen Independent Research from 2020 availability surveys.

Among goods firms, those owned by persons with disabilities (75%) were more likely than other business owners (44%) to report revenue less than \$0.5 million. No firms owned by persons with disabilities that were survey indicated revenues of \$8 million or more. About 16 percent of all other goods firms reported this level of revenue.

Other services. Figure H-29 presents the reported annual revenue for Colorado firms in the other services industry.

- A large portion of MBEs surveyed in this industry indicated annual revenue of less than \$0.5 million per year. Results in Figure H-29 shows that MBEs (80%) were much more likely to be firms with less than \$0.5 million in revenue compared with WBEs (67%) and majority-owned firms (66%).
- No MBEs and about 2 percent of WBEs indicated revenue exceeding \$8 million. About 5 percent of majority-owned firms in the industry reported average revenue of more than \$8 million per year.

Figure H-29.
Average annual gross revenue of company over previous five years,
Colorado other services industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Among Colorado other service firms, those owned by persons with disabilities were somewhat less likely than other firms to report high average annual revenue. For example, while no firms owned by persons with disabilities reported revenues of \$3.5 million or more, 7 percent of all other firms reported such revenues.

C. 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.¹⁷

The study team directly measured bid capacity in its availability analysis.¹⁸

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Data. The availability analysis produced a database of construction, construction-related professional service, other professional service and other service businesses for which bid capacity could be examined.

“Relative bid capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the six years preceding when the study team interviewed it.

Results. As shown in Figure H-30, many companies indicated that their largest contract was less than \$100,000. Relatively few firms reported performing or bidding on contracts of \$5 million or more.

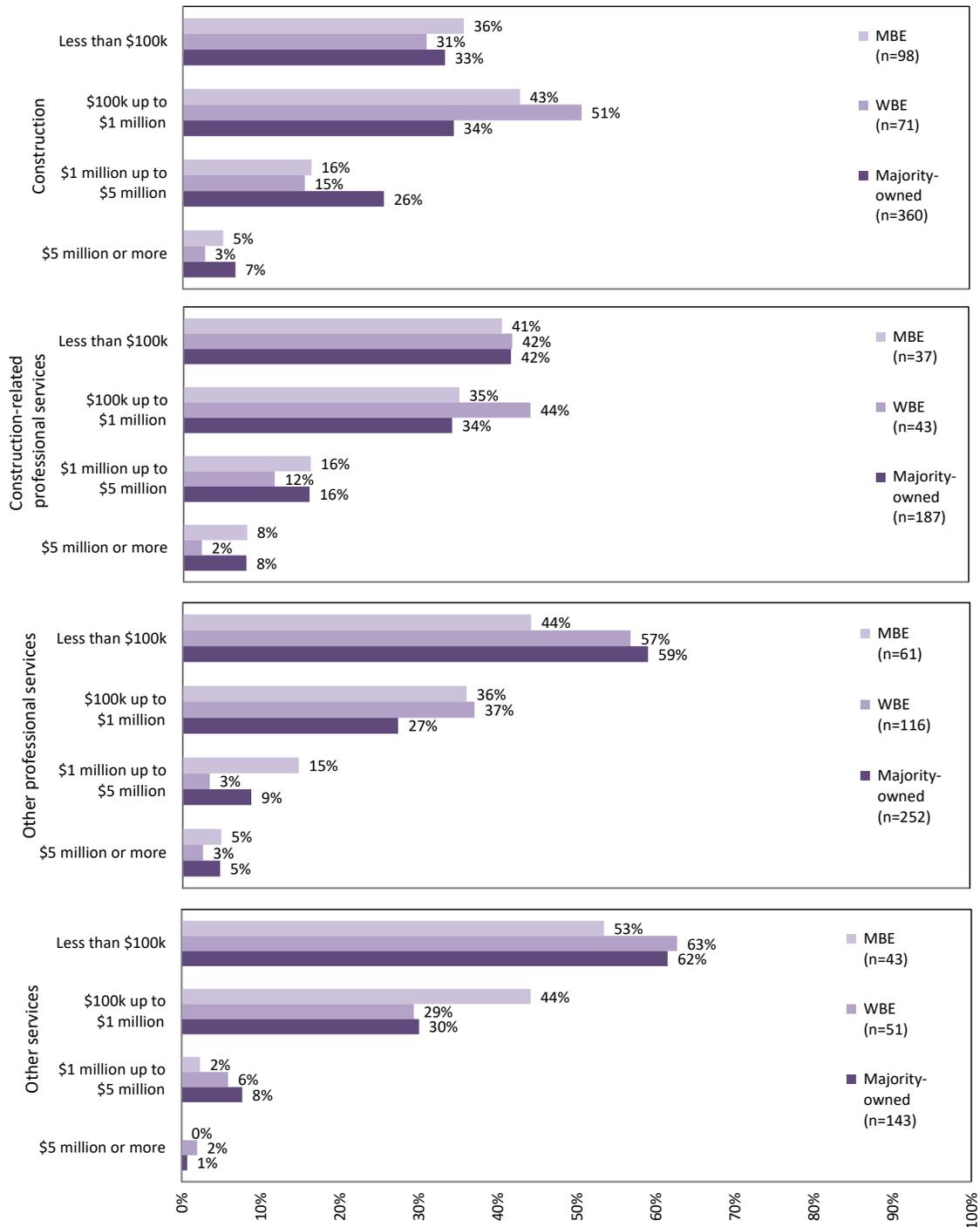
- In construction, 36 percent of MBEs, 31 percent of WBEs and 33 percent of majority-owned firms indicated that the largest contract they had bid on or been awarded was less than \$100,000. Relatively few MBEs (21%) and WBEs (18%) reported that they had bid on contracts of more than \$1 million. About 33 percent of majority-owned construction companies stated that they had bid on contracts of that size.
- In contrast, among construction-related professional services, other professional services and other services companies there was little overall difference in the largest size of contracts bid between MBEs, WBEs and majority-owned firms.

¹⁷ 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, et al.*, 545 F.3d 1023 (Fed. Cir. 2008).

¹⁸ See Appendix D for details about the availability survey process.

Figure H-30.

Largest contract bid on or awarded (bid capacity) by industry for firms in Colorado, 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.

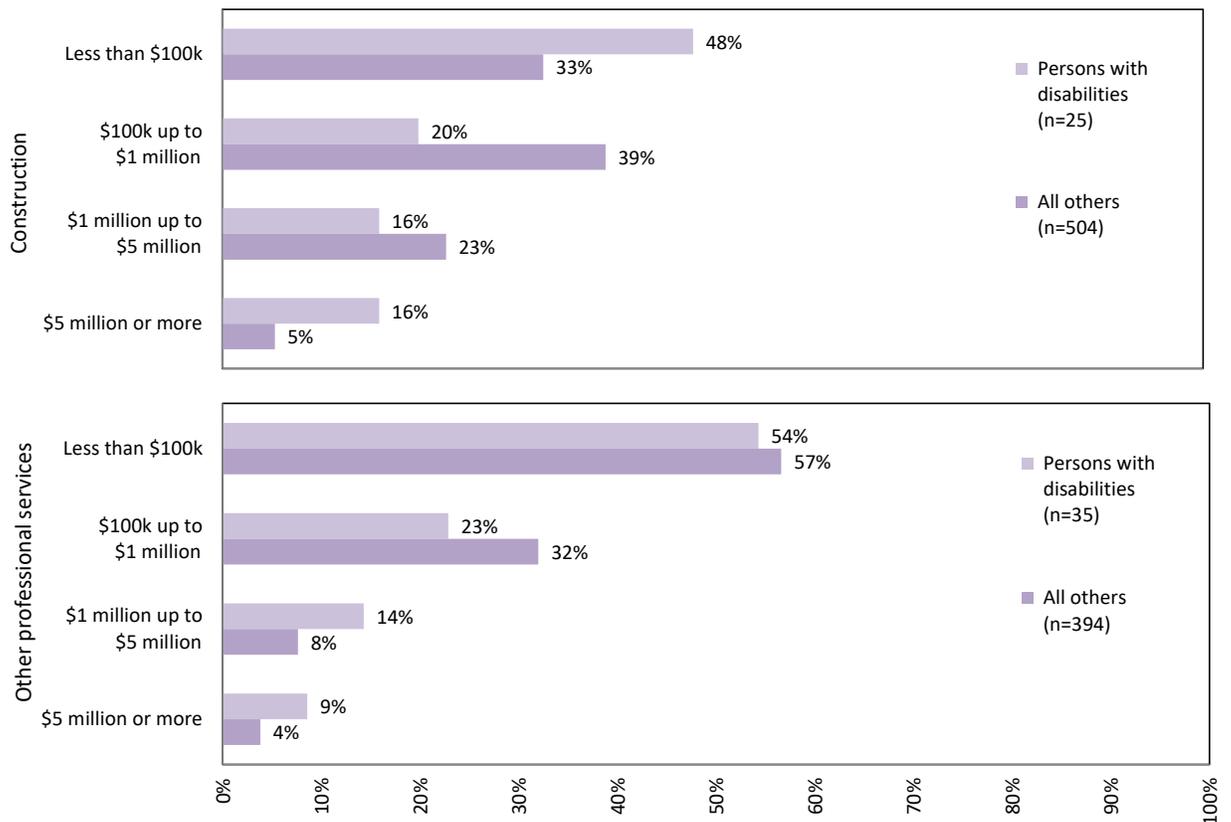
Source: Keen Independent Research from 2020 availability surveys.

Figure H-31 on the following page presents bid capacity by study industry for firms owned by persons with disabilities and all others. Because of the small number of responses from firms owned by persons with disabilities, results for all industries are not shown. For construction firms, those owned by persons with disabilities tended to work or bid on smaller projects when compared to all other construction firms.

In the other professional services industry, there was little overall difference in these results for businesses owned by persons with disabilities compared with other firms.

Figure H-31.

Largest contract bid on or awarded (bid capacity) by industry for firms in Colorado, firms owned by persons with disabilities and all others



Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Above median bid capacity. The study team further explored bid capacity on a subindustry level. Subindustries such as highway, street and bridge construction tend to involve relatively large projects. Other subindustries, such as installation of guardrails, fencing or signs, typically involve smaller contracts.

Figure H-32 below and on the following page reports the median relative bid capacity among Colorado businesses in 43 subindustries. Results categorized companies according to their primary line of business.

Figure H-32.

Median relative capacity of Colorado businesses by subindustry

Subindustry	Median bid capacity
Construction industry	
Highway, street and bridge construction	\$5 million
Office and public building construction	\$2 million
Underground utilities (water, sewer and utilities lines)	More than \$1 million up to \$2 million
Asphalt, concrete or other paving	More than \$0.5 million up to \$1 million
Temporary traffic control	More than \$0.5 million up to \$1 million
Electrical work	More than \$0.1 million up to \$0.5 million
Excavation, site prep, grading and drainage	More than \$0.1 million up to \$0.5 million
Roofing	More than \$0.1 million up to \$0.5 million
Landscape contracting	More than \$0.1 million up to \$0.5 million
Drilling and foundations	More than \$0.1 million up to \$0.5 million
Concrete work	More than \$0.1 million up to \$0.5 million
Plumbing, heating and air conditioning	More than \$0.1 million up to \$0.5 million
Installation of guardrails, fencing or signs	Up to \$0.1 million
Trucking and hauling	Up to \$0.1 million
Other - construction	More than \$0.1 million up to \$0.5 million
Construction-related professional services	
Construction management	\$2 million
Architecture and engineering	More than \$0.1 million up to \$0.5 million
Transportation planning	More than \$0.1 million up to \$0.5 million
Surveying and mapping	Up to \$0.1 million
Real estate consulting and appraisal services	Up to \$0.1 million
Environmental consulting	Up to \$0.1 million
Other - construction-related professional services	Up to \$0.1 million
Other professional services	
IT and data services (including programming and data processing)	Up to \$0.1 million
Medical insurance management	Up to \$0.1 million
Business research and consulting	Up to \$0.1 million
Advertising, marketing, graphic design and public relations	Up to \$0.1 million
Human resources and job training	Up to \$0.1 million
Other - other professional services	Up to \$0.1 million

Figure H-32 (continued).

Median relative capacity of Colorado businesses by subindustry

Subindustry	Median bid capacity
Other services	
Elevator services	More than \$0.5 million up to \$1 million
Landscape maintenance	More than \$0.1 million up to \$0.5 million
Security guard services	More than \$0.1 million up to \$0.5 million
Staffing services	More than \$0.1 million up to \$0.5 million
Aircraft maintenance and repair services	More than \$0.1 million up to \$0.5 million
Equipment repair services	More than \$0.1 million up to \$0.5 million
Delivery services	More than \$0.1 million up to \$0.5 million
Facilities operations and support (includes corrections)	\$0.1 million
Building cleaning and maintenance	Up to \$0.1 million
Local transportation services	Up to \$0.1 million
Security systems services	Up to \$0.1 million
Waste collection and disposal	Up to \$0.1 million
Printing and copying	Up to \$0.1 million
Contracted food services	Up to \$0.1 million
Other - other services	Up to \$0.1 million

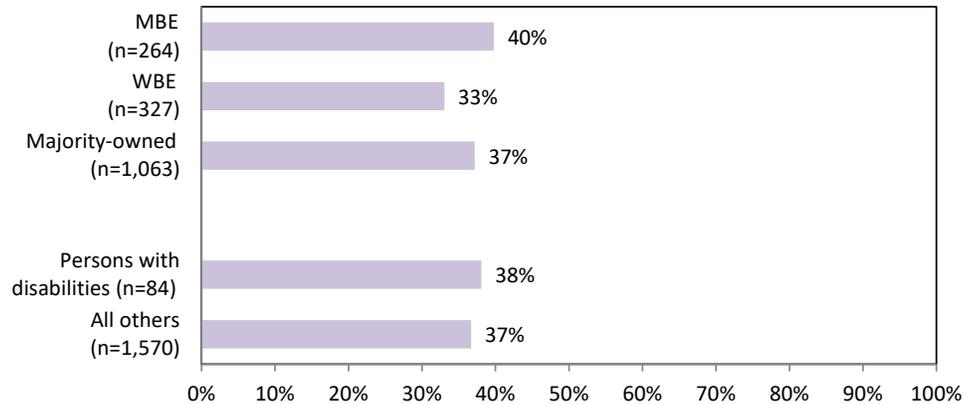
Source: Keen Independent Research from 2020 availability surveys.

Comparison of above median bid capacity for firms owned by minorities, women and persons with disabilities. Based on the median bid capacity figures identified in Figure H-32, the study team classified firms into “above median bid capacity,” “at median bid capacity” and “below median bid capacity” for the subindustry that described their primarily line of business. Similar percentages of MBEs (40%) and majority-owned firms (37%) had above median bid capacity for their subindustries. A lower percentage of WBEs (33%) had above median bid capacity for their subindustry.

A similar percentage of firms owned by persons with disabilities (38%) and firms owned by all others (37%) had a bid capacity higher than the median capacity for their subindustry.

Figure H-33.
Percent of firms above
median bid capacity for
their subindustry,
Colorado, 2020

Source:
Keen Independent Research
from 2020 availability surveys.



D. Availability Survey Results Concerning Potential Barriers

As part of the availability surveys conducted with Colorado 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. (See Appendix D for additional information.)

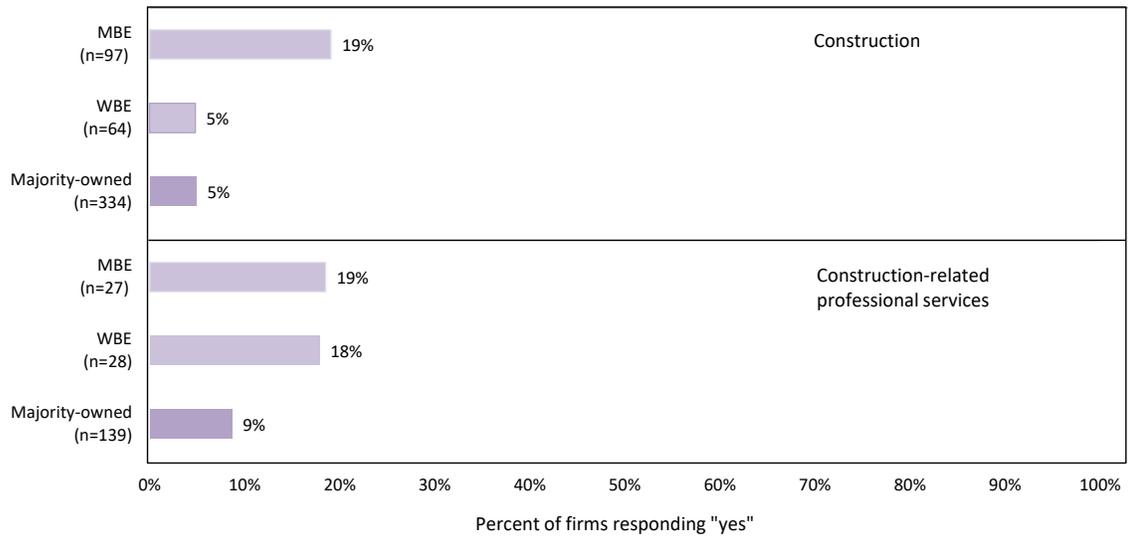
Results for survey questions are discussed within the context of the relevant study industry; some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three sets: barriers related to bidding requirements and project size, barriers related to learning about bid opportunities, and barriers related to receiving payment for projects. Results by industry are discussed within each set of barriers. (See Appendix G for results to access to capital questions.)

Barriers related to bidding requirements and project size. In the availability survey, firms were asked about being prequalified for work, insurance requirements and other barriers to bidding.

Prequalification. Only construction and construction-related professional service firms were asked if they had experienced difficulties becoming prequalified for work. Figure H-34 presents the results.

- In the construction industry, MBEs (19%) were the most likely to report difficulties becoming prequalified.
- Among construction-related professional service firms, MBEs (19%) and WBEs (18%) were more likely than majority-owned firms (9%) to report difficulties with prequalification.

Figure H-34.
Responses to availability survey question concerning difficulties with prequalification, Colorado firms, MBEs, WBEs and majority-owned firms



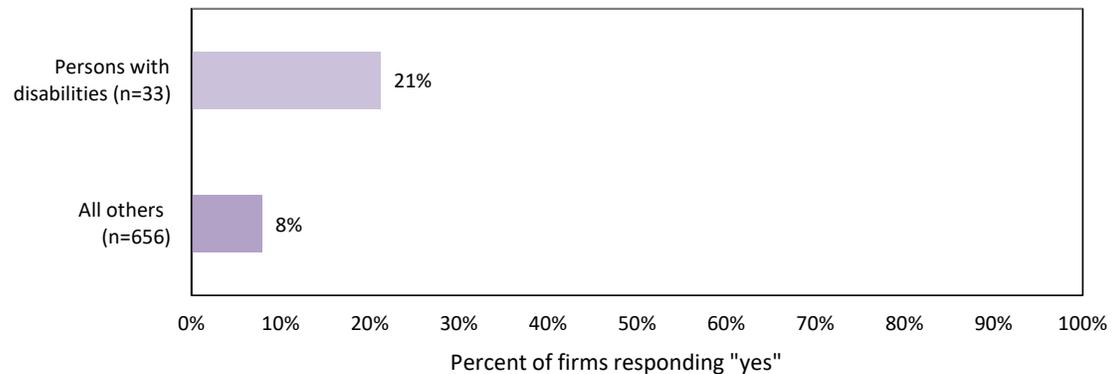
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Figure H-35 presents reported difficulties becoming prequalified for work by disability status of the firm owner. Due to low sample size, results for the construction industry and the construction-related professional services industry are combined.

Among construction and construction-related professional service firms, relatively more firms owned by persons with disabilities reported experiencing difficulties becoming prequalified compared to all other firms (21% and 8%, respectively).

Figure H-35.
Responses to availability survey question concerning difficulties with prequalification, Colorado firms, firms owned by persons with disabilities and all others



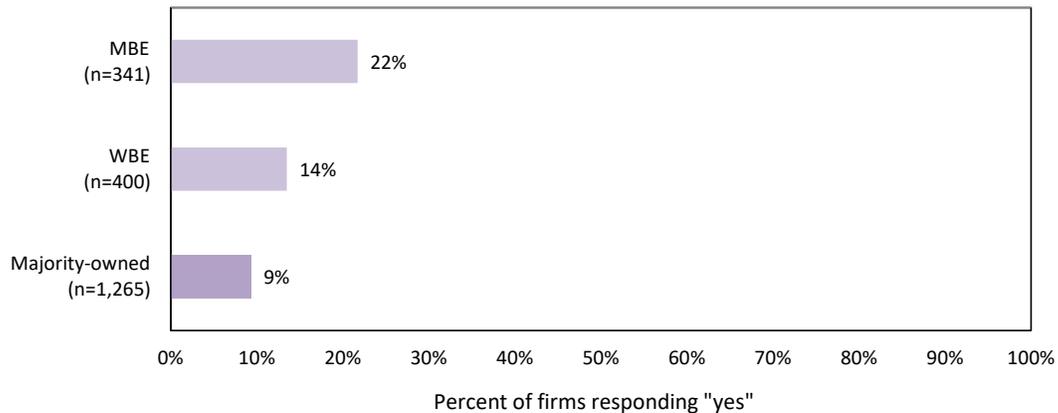
Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Insurance requirements. Firms across industries were asked if insurance requirements on projects had presented a barrier to bidding. Because the results for individual study industries were similar, Figure H-36 presents responses for MBE, WBE and majority-owned firms in all study industries combined.

MBEs (22%) were considerably more likely than other businesses to report that insurance requirements acted as a barrier to bidding. WBEs (14%) were somewhat more likely than majority-owned firms (9%) to report difficulties due to insurance requirements.

Figure H-36.
Responses to availability survey question concerning barriers due to insurance requirements, Colorado firms, MBEs, WBEs and majority-owned firms

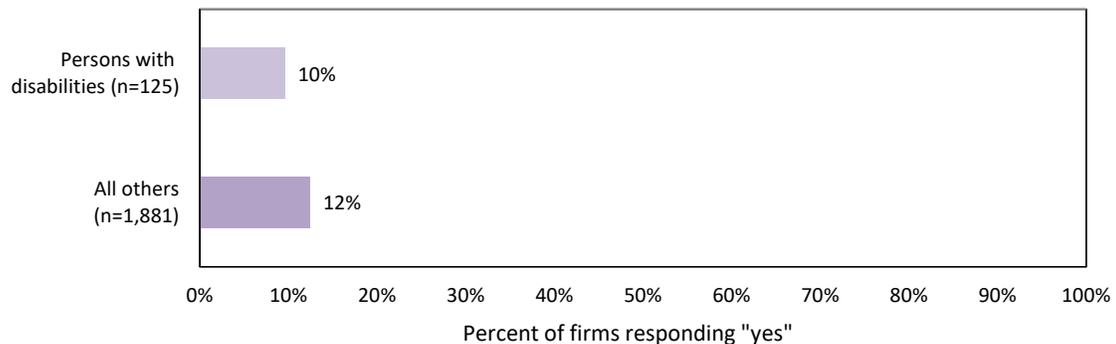


Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Survey results by disability status are presented in Figure H-37. Firms owned by persons with disabilities (10%) were no more likely than other firms (12%) to report that insurance requirements presented a barrier to bidding.

Figure H-37.
Responses to availability survey question concerning barriers due to insurance requirements, Colorado firms, firms owned by persons with disabilities and all others



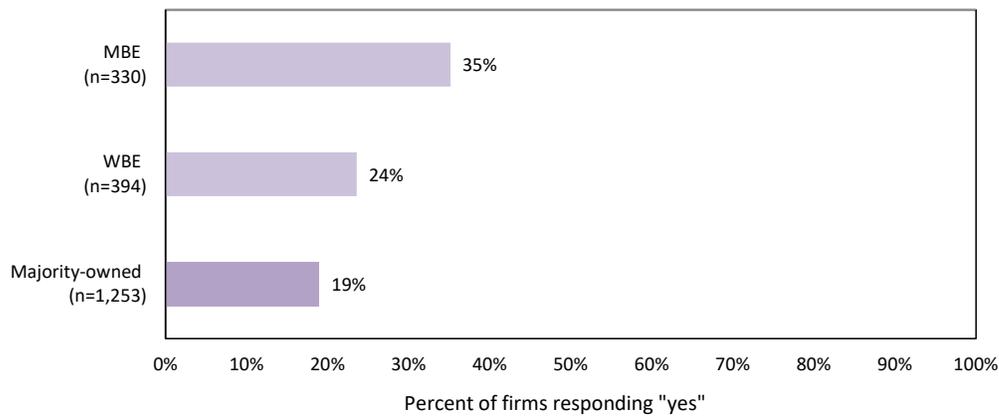
Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Project size. Surveyed firms were also asked if the large size of projects has presented a barrier to bidding. Results for MBE, WBE and majority-owned firms are presented in Figure H-38.

- In study industries, relatively more MBEs (35%) and WBEs (24%) than majority-owned firms (19%) reported that large project size presented a barrier to bidding.
- As with barriers related to insurance requirements, industry-specific reports of large project size presenting a barrier to bidding were similar across study industries.

Figure H-38.
Responses to availability survey question concerning large project size, Colorado firms, MBEs, WBEs and majority-owned firms

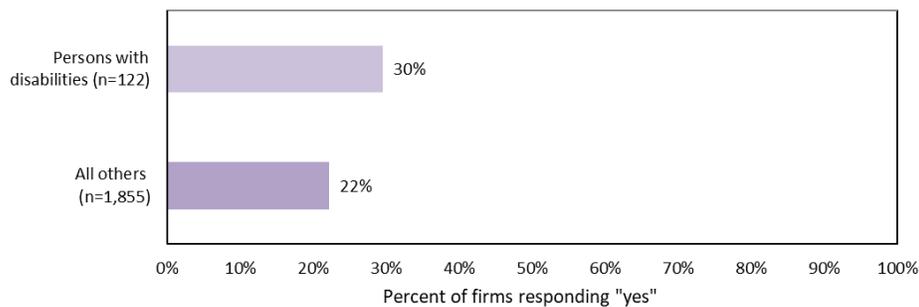


Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Figure H-39 presents results of reported difficulties due to large project size by the firm owner's disability status. In all surveyed industries combined, firms owned by persons with disabilities were more likely than all other businesses to report that large project size has presented a barrier to bidding.

Figure H-39.
Responses to availability survey question concerning large project size, Colorado firms, firms owned by persons with disabilities and all others



Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

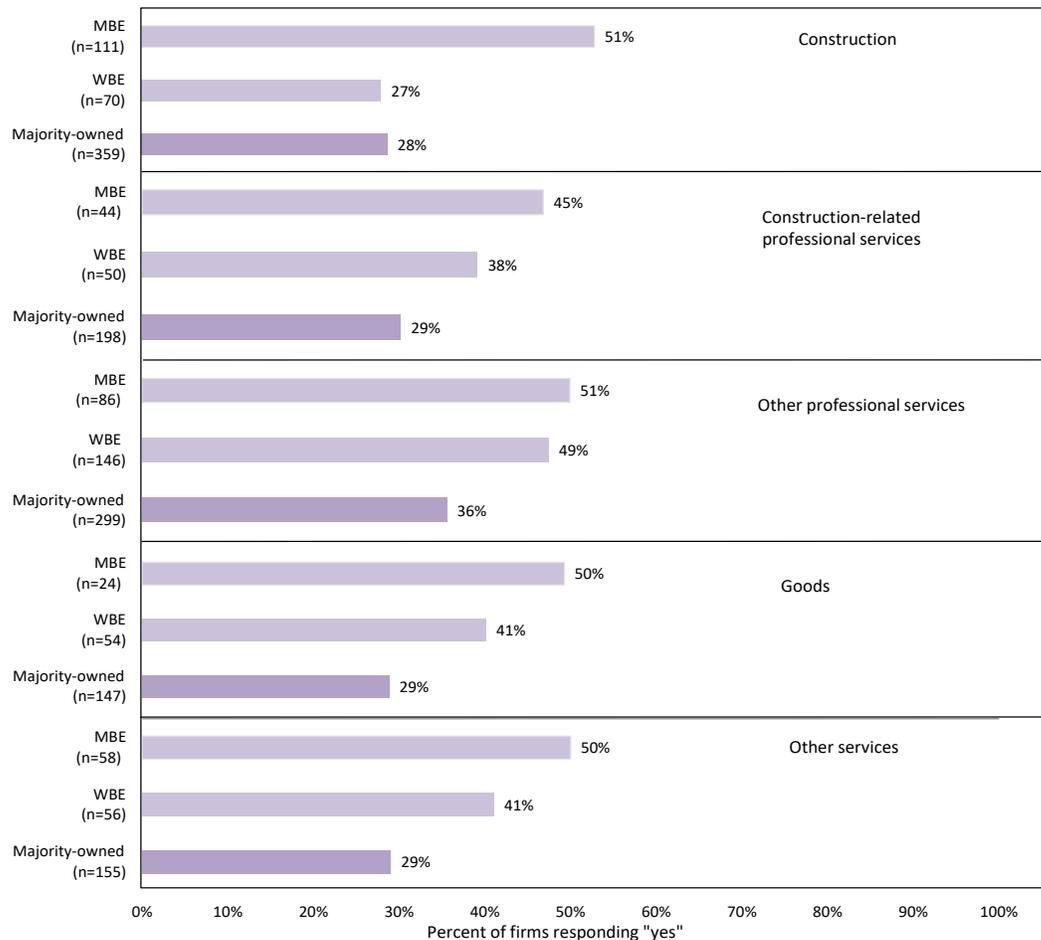
Source: Keen Independent Research from 2020 availability surveys.

Barriers related to learning about bid opportunities. The availability survey asked firms about difficulties learning about work. These questions included difficulties learning about bid opportunities with State agencies in Colorado, difficulties learning about bid opportunities in the private sector and difficulties learning about subcontracting or subconsulting opportunities.

Bid opportunities with State agencies in Colorado. Firms in all industries were asked if they had experienced any difficulties learning about bid opportunities with State agencies in Colorado. Results by industry are presented in Figure H-40.

MBEs were most likely to report difficulties learning about bid opportunities with State agencies. Across industries, about one-half of MBEs surveyed indicated this difficulty, much higher than the results for majority-owned businesses. In each industry except for construction, relatively more WBEs than majority-owned firms indicated difficulties with learning about bid opportunities with State agencies.

Figure H-40.
Responses to availability survey question concerning difficulties learning about work with State agencies in Colorado, Colorado firms, MBEs, WBEs and majority-owned firms



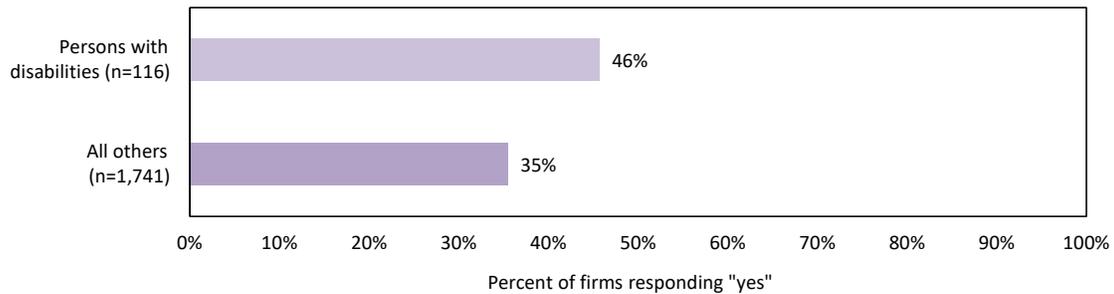
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Figure H-41 presents reported difficulties learning about bid opportunities with State agencies in Colorado by the firm owner's disability status for each study industry. Due to small sample size, results for individual study industries were combined.

In all study industries, firms owned by persons with disabilities were relatively more likely than all others to report difficulties learning about bid opportunities with State agencies in Colorado (46% and 35%, respectively).

Figure H-41.
Responses to availability survey question concerning difficulties learning about work with State agencies in Colorado, Colorado firms, firms owned by persons with disabilities and all others



Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

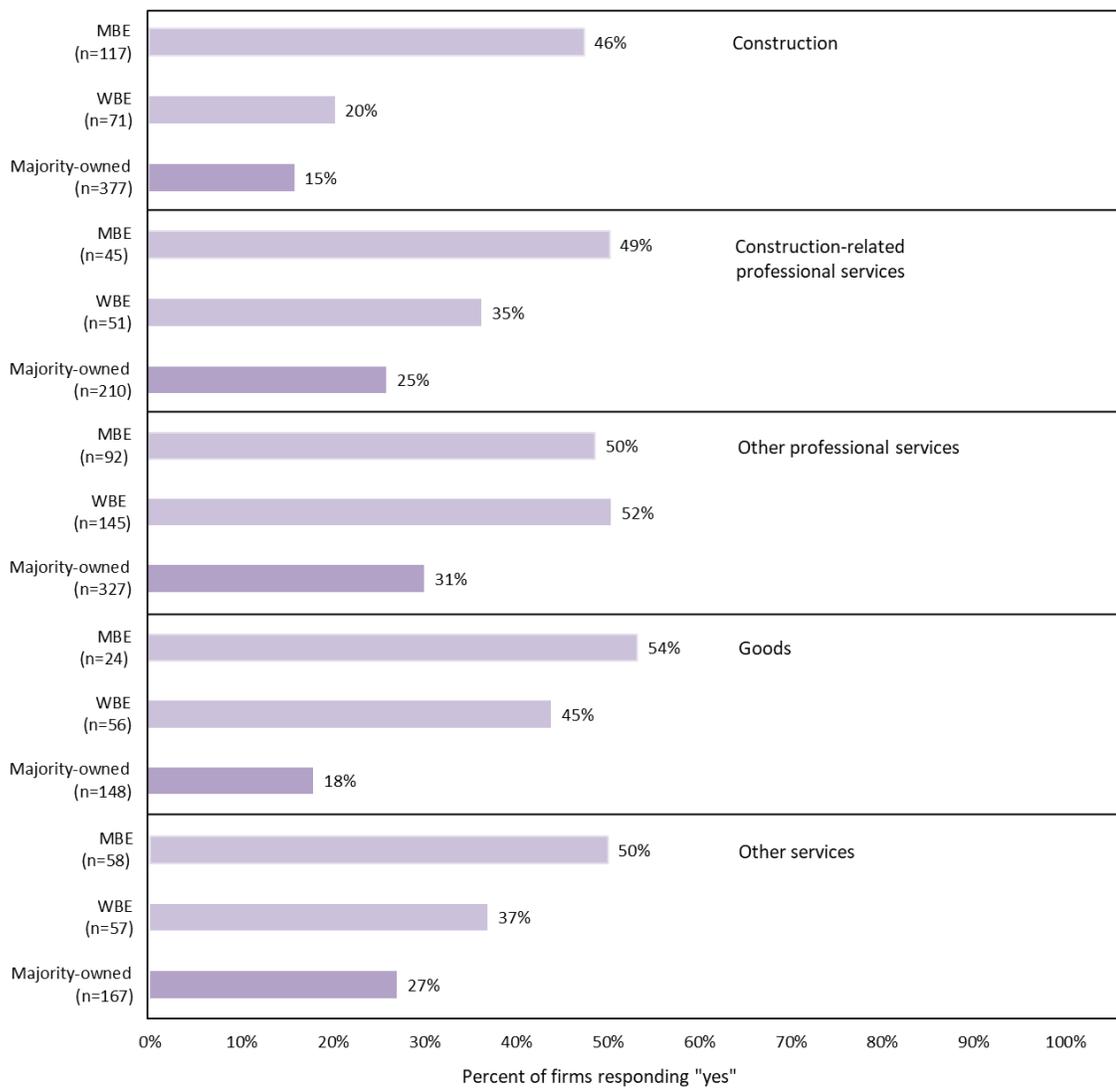
Source: Keen Independent Research from 2020 availability surveys.

Bid opportunities in the private sector. Firms in all industries were also asked about difficulties learning about bid opportunities in the private sector in general in Colorado. Results by industry are presented in Figure H-42.

Again, about one-half of MBEs reported difficulties learning about bid opportunities in the private sector, a much larger percentage than shown for majority-owned companies. WBEs were also more likely than majority-owned firms to report difficulties learning about bid opportunities in the private sector.

Figure H-42.

Responses to availability survey question concerning difficulties learning about work in the private sector, Colorado firms, MBEs, WBEs and majority-owned firms

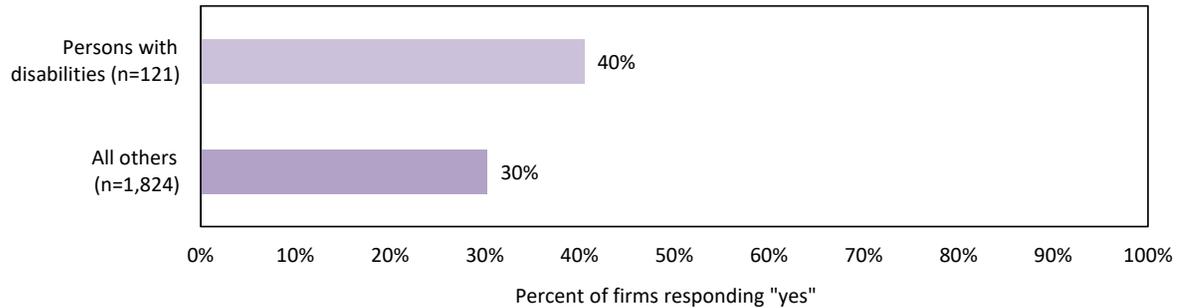


Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

As shown in Figure H-43, firms owned by persons with disabilities were more likely than other companies to report difficulties learning about bid opportunities in the private sector. (Because of small sample size, survey results for all industries were combined.)

Figure H-43.
Responses to availability survey question concerning difficulties learning about work in the private sector, Colorado firms, firms owned by persons with disabilities and all others



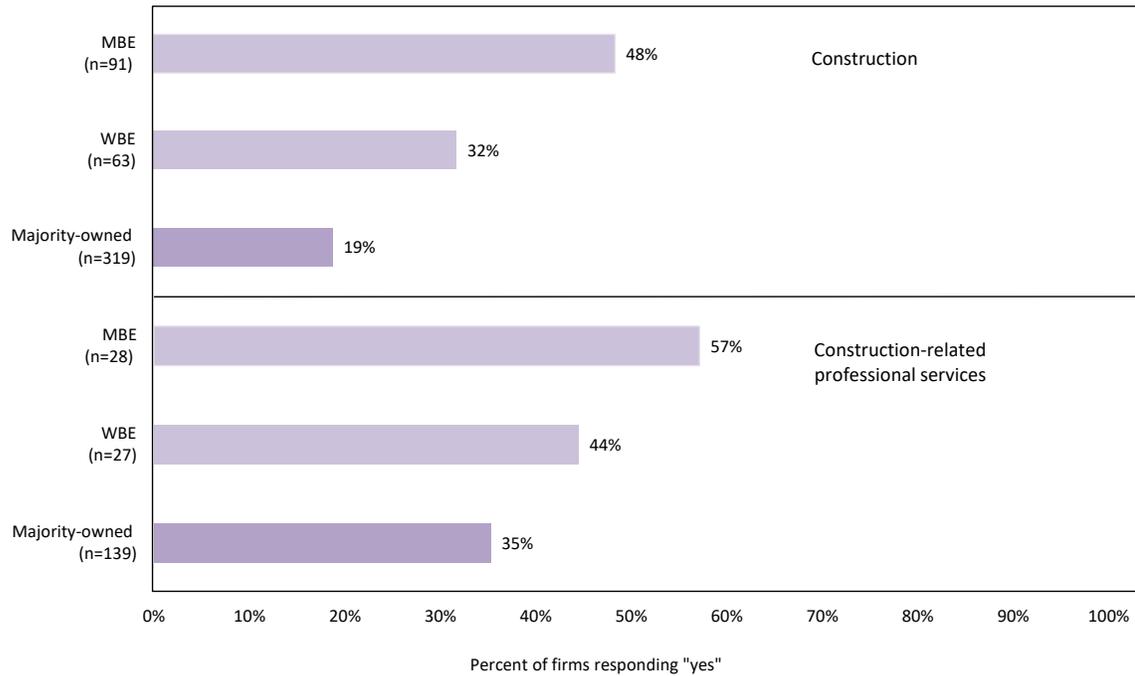
Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Subcontracting or subconsulting opportunities. Construction and construction-related professional service firms were asked if they had experienced any difficulties learning about subcontracting or subconsulting opportunities with prime contractors in Colorado. Results by industry are shown in Figure H-44.

- In the Colorado construction industry, a larger portion of MBEs (48%) and WBEs (32%) reported difficulties learning about subcontracting opportunities when compared to majority-owned firms (19%).
- Similarly, in the Colorado construction-related professional services industry, relatively more MBEs (57%) and WBEs (44%) indicated difficulties learning about subcontracting opportunities than majority-owned firms (35%).

Figure H-44.
Responses to availability survey question concerning difficulties learning about subcontracting or subconsulting opportunities, Colorado firms, MBEs, WBEs and majority-owned firms

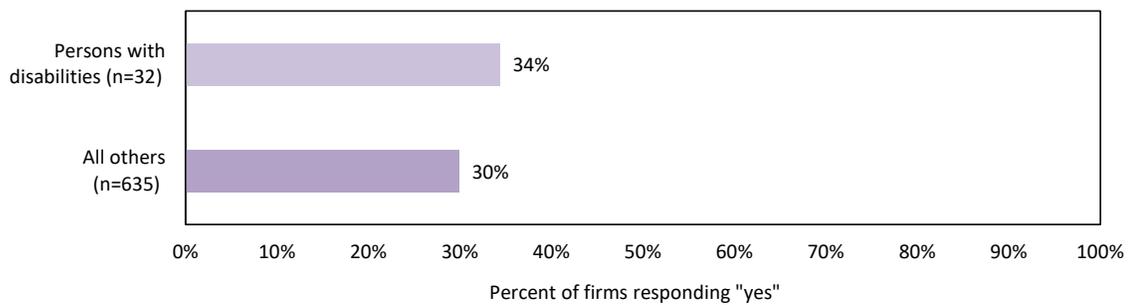


Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Figure H-45 presents results for questions concerning learning about subcontracting or subconsulting opportunities by the disability status of the firm owner. Because of small sample size, results for the construction and construction-related professional service industries were combined. Firms owned by persons with disabilities (34%) were somewhat more likely than other companies (30%) to report difficulties learning about subcontracting or subconsulting opportunities.

Figure H-45.
Responses to availability survey question concerning difficulties learning about subcontracting or subconsulting opportunities, Colorado firms, firms owned by persons with disabilities and all others



Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Barriers related to receiving payment for projects. In the availability survey, firms were asked about difficulties with the following:

- Receiving payment from Colorado State agencies;
- Receiving payment from prime contractors;
- Receiving payment from other customers; and
- Obtaining approval from inspectors or prime contractors.

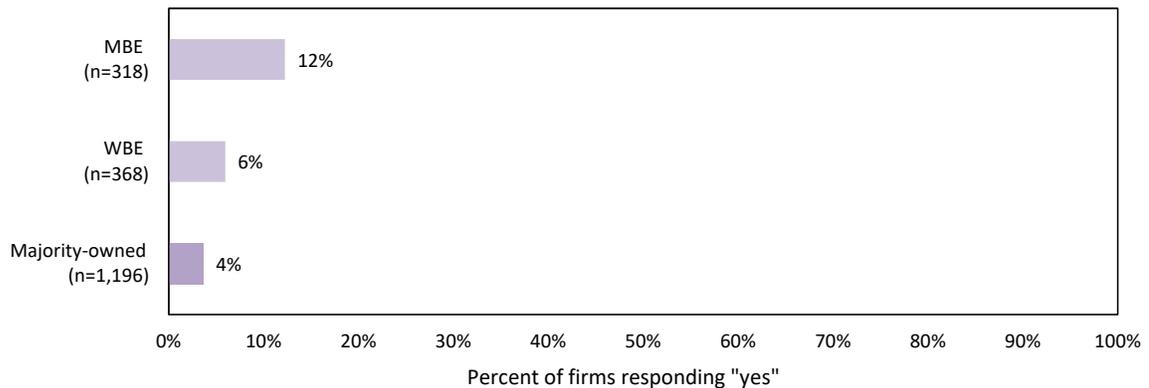
Not all questions were asked for firms in all study industries.

Difficulties receiving payment from Colorado State agencies. Firms in all study industries were asked if they had experienced any difficulties receiving payment from State agencies in Colorado. Because the results for individual study industries were similar, Figure H-46 presents responses for all study industries combined.

- MBEs (12%) were more likely than majority-owned firms (4%) to report difficulties receiving payment from Colorado State agencies.
- WBEs (6%) were also more likely than majority-owned firms to indicate such difficulties.

Figure H-46.

Responses to availability survey question concerning difficulties receiving payment from Colorado State agencies, Colorado firms, MBEs, WBEs and majority-owned firms



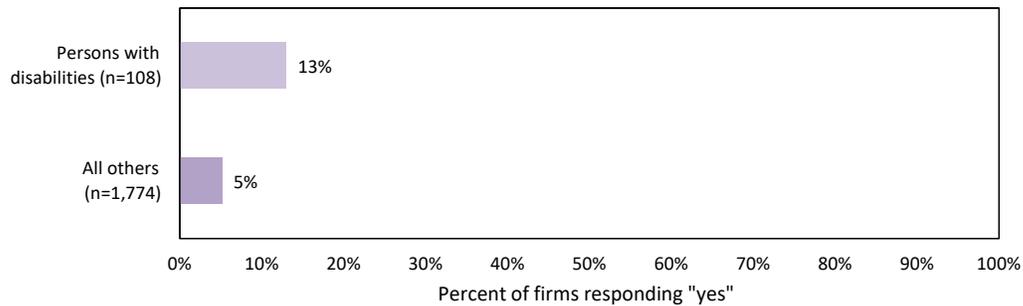
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Firms owned by persons with disabilities were also more likely than other businesses to report difficulties receiving payment from Colorado State agencies. These results are presented in Figure H-47.

Figure H-47.

Responses to availability survey question concerning difficulties receiving payment from Colorado State agencies, Colorado firms, firms owned by persons with disabilities and all others



Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

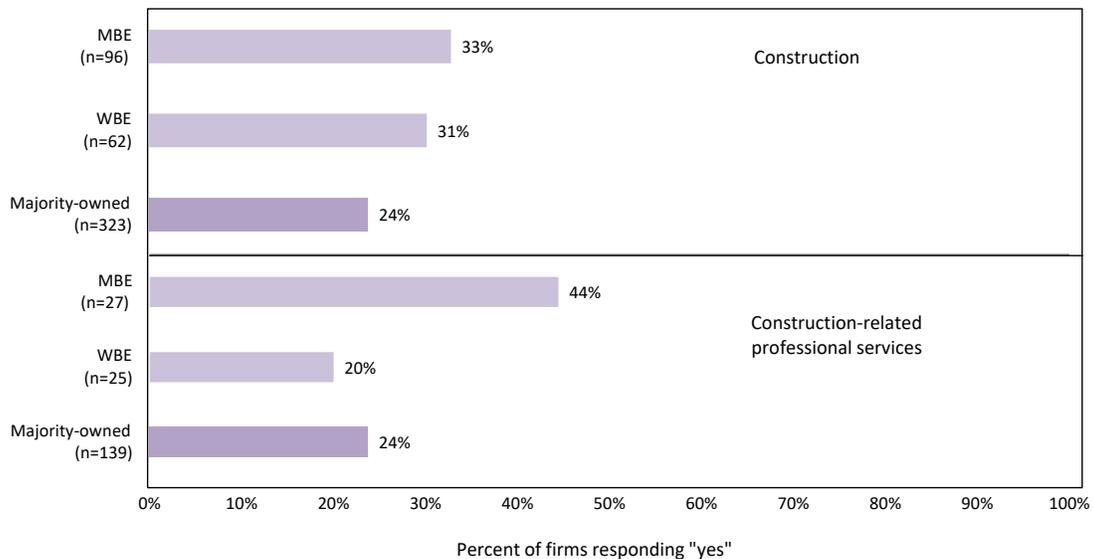
Difficulties receiving payment from prime contractors. Firms in the Colorado construction and construction-related professional services industries were asked if they had experienced difficulties receiving payment from prime contractors in a timely manner. Results for MBEs, WBEs and majority-owned firms are presented in Figure H-48.

In the construction industry, relatively more MBEs (33%) and WBEs (31%) reported difficulties receiving payment from prime contractors than majority-owned firms (24%).

Among construction-related professional service firms, MBEs were considerably more likely than other businesses to indicate difficulties receiving payment from prime contractors.

Figure H-48.

Responses to availability survey question concerning difficulties receiving payment from prime contractors, Colorado firms, MBEs, WBEs and majority-owned firms



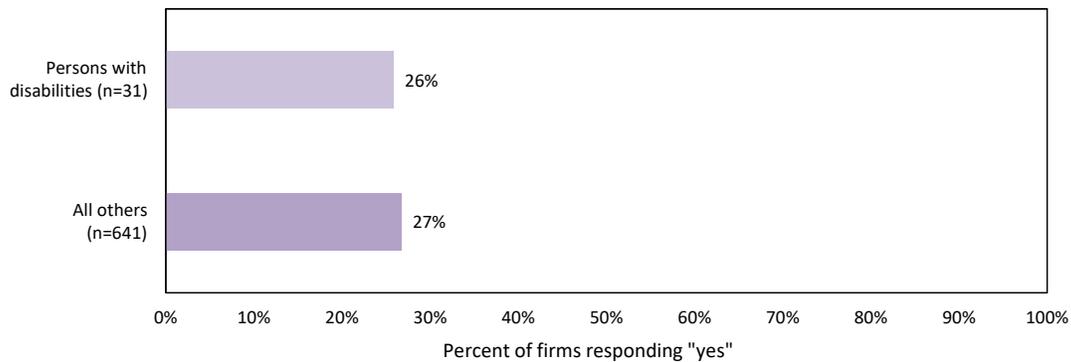
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Firms owned by persons with disabilities in the combined construction and the construction-related professional services industries were no more likely than other businesses to report difficulties receiving payment from prime contractors. (Results for individual industries were combined due to small sample size.) Figure H-49 shows these results.

Figure H-49.

Responses to availability survey question concerning difficulties receiving payment from prime contractors, Colorado firms, firms owned by persons with disabilities and all others



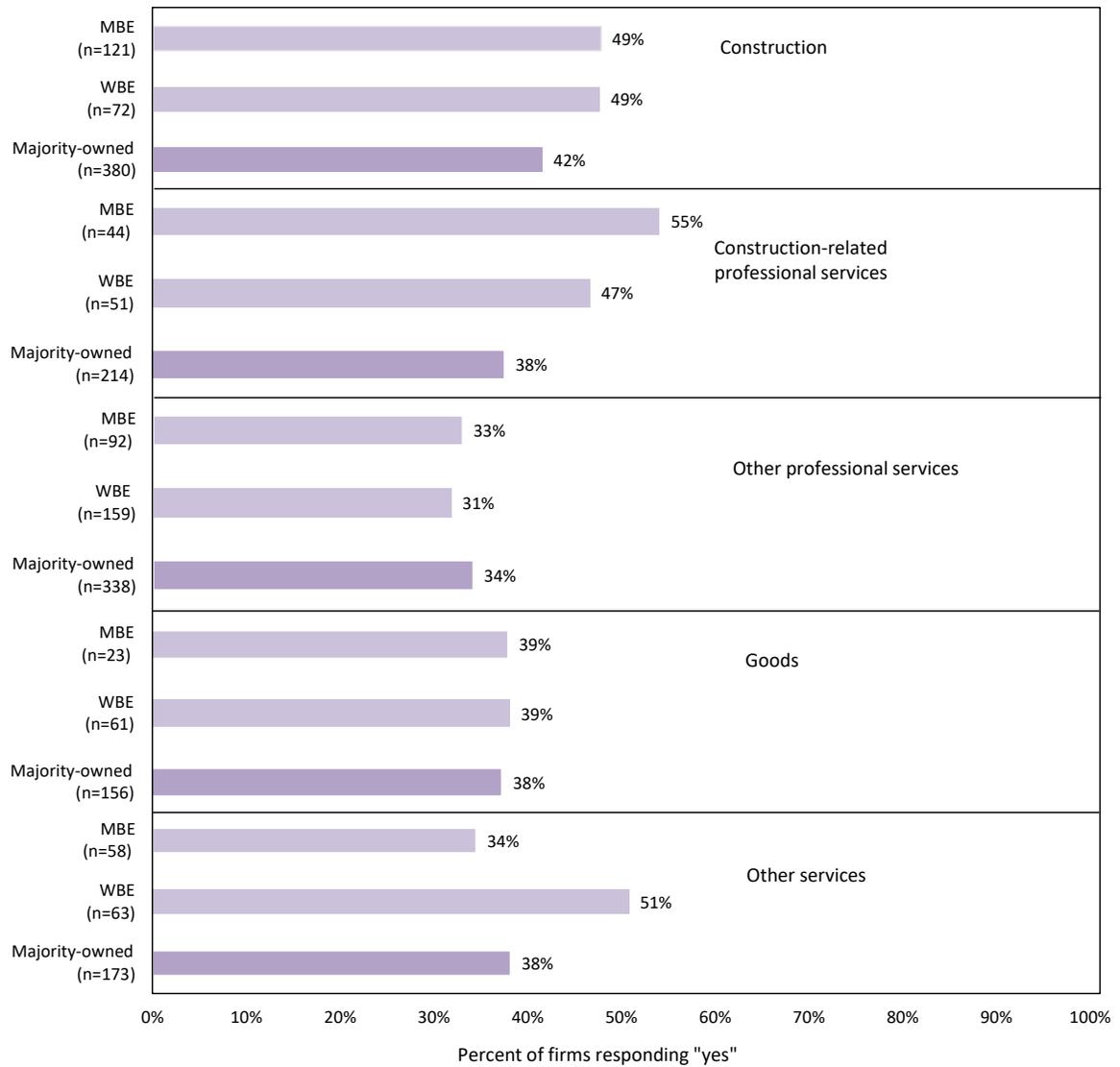
Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Difficulties receiving payment from other customers. All firms were also asked if they had experienced difficulties receiving payment from other customers in a timely manner. Figure H-50 presents these results for MBEs, WBEs and majority-owned firms by industry.

- In both the construction industry and the construction-related professional services industry, relatively more MBEs and WBEs reported difficulties receiving payment when compared to majority-owned firms in their industry.
- Among other service firms, WBEs were most likely to report such difficulties.
- In the goods industry and the other professional services industry, rates of reported difficulties receiving payment were similar across all groups.

Figure H-50.
 Responses to availability survey question concerning difficulties receiving payment from other customers, Colorado firms, MBEs, WBEs and majority-owned firms



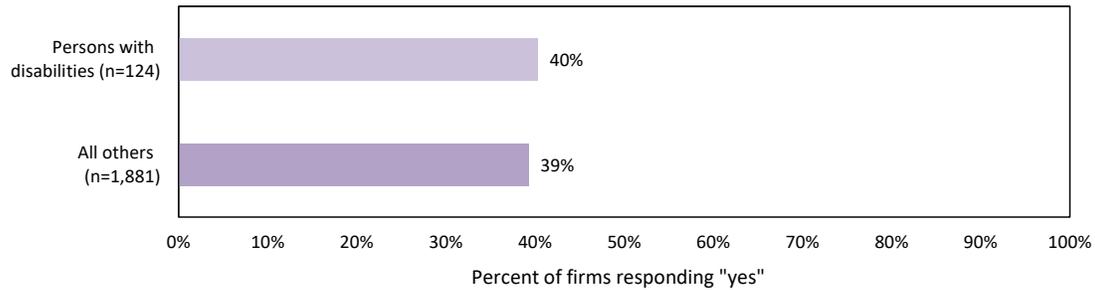
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

Businesses owned by persons with disabilities in all industries combined were about as likely as all other firms to indicate difficulties receiving payment from other customers. (Responses for individual industries were combined due to small sample size.) These results are presented in Figure H-51.

Figure H-51.

Responses to availability survey question concerning difficulties receiving payment from other customers, Colorado firms, firms owned by persons with disabilities and all others



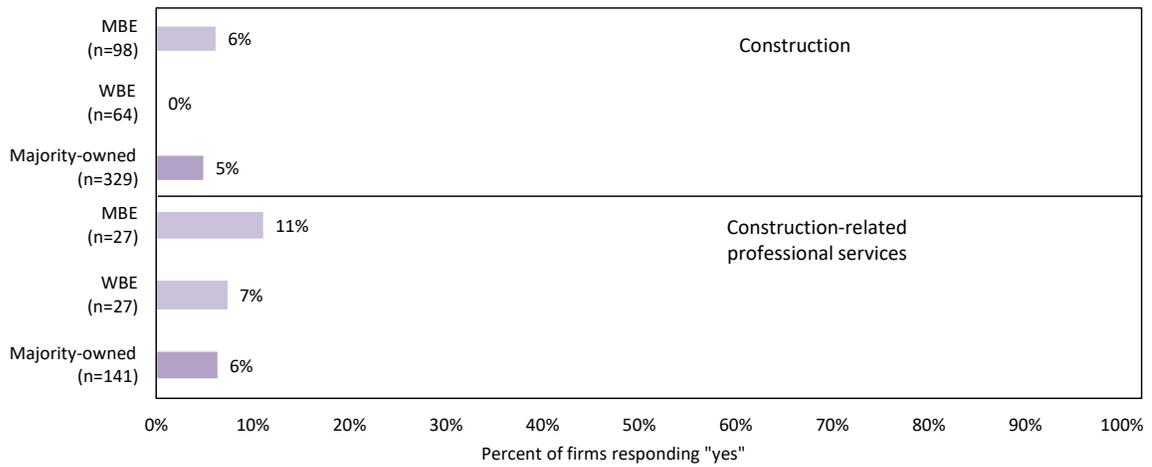
Note: "Persons with disabilities" refers to firms owned by these individuals. "All others" refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

Difficulties obtaining approval from inspectors or prime contractors. Finally, the availability survey asked construction and construction-related professional service firms if they had experienced any difficulties obtaining final approval on work from inspectors, project managers or prime contractors/consultants. Results for MBEs, WBEs and majority-owned firms are presented in Figure H-52.

- In the construction industry, only 6 percent of MBEs and 5 percent of majority-owned firms reported difficulties obtaining approval from inspectors or prime contractors. No WBEs reported such difficulties.
- Among construction-related professional service firms, MBEs (11%) were more likely than WBEs (7%) and majority-owned firms (6%) to indicate difficulties obtaining approval from project managers or prime consultants.

Figure H-52.
Responses to availability survey question concerning difficulties obtaining approval of work, Colorado firms, MBEs, WBEs and majority-owned firms

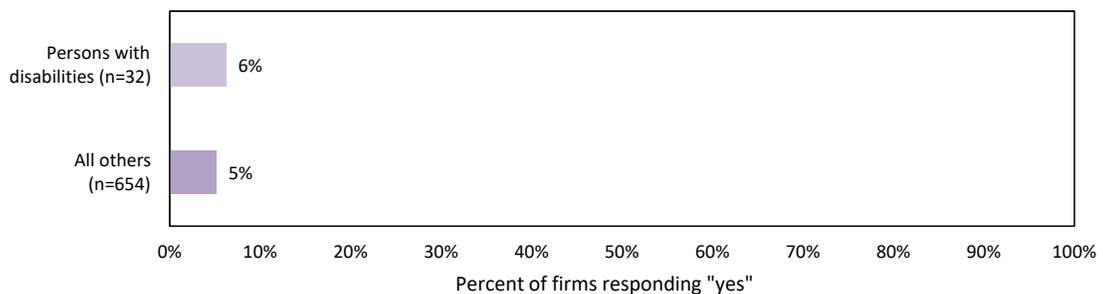


Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2020 availability surveys.

As shown in Figure H-53, a similar portion of businesses owned by persons with disabilities reported difficulties receiving approval when compared to all other firms. (Results for construction and construction-related professional service firms were combined due to small sample size.)

Figure H-53.
Responses to availability survey question concerning difficulties obtaining approval of work, Colorado firms, firms owned by persons with disabilities and all others



Note: “Persons with disabilities” refers to firms owned by these individuals. “All others” refers to all other firms.

Source: Keen Independent Research from 2020 availability surveys.

E. Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions and contractions. That study found that, between 2002 and 2006, 27 percent of privately held businesses in Colorado that were nonminority-owned had expanded their employment, 22 percent had contracted and 31 percent had closed. In comparison:

- African American- and Asian American-owned firms were less likely to expand and more likely to contract or close.
- Hispanic American-owned businesses were more likely to close than non-Hispanic white-owned firms.

The study team used data from several different sources to analyze business receipts and earnings for businesses owned by minorities, female and persons with disabilities.

- Analysis of U.S. Census Bureau data for Colorado from the 2012 Survey of Business Owners indicated lower average receipts for businesses owned by racial and ethnic minorities and women than businesses owned non-minorities or men. National data showed that these general patterns persist across industries.
- Data from 2014–2018 American Community Survey indicated that, in Colorado:
 - Business owners who were racial and ethnic minorities reported lower earnings than non-Hispanic white business owners in all relevant study industries;
 - Female business owners had lower earnings than male business owners;
 - Business owners with a disability reported lower earnings than other business owners; and
 - These general patterns were observed across different industries.
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant effects of race, gender and disability status on business earnings in some study industries. (In some other industries, there were strong indications of lower earnings, but results were not statistically significant due to small sample sizes.) These model results were especially consistent across industries for female business owners.
- Data from availability surveys conducted for this study showed that in each of the Colorado study industries individually, MBEs and WBEs were more likely to be low-revenue firms (with average annual gross revenue of less than \$500,000).

Answers to questions concerning marketplace barriers in the availability survey indicated that relatively more MBEs and WBEs than majority-owned firms face the following barriers:

- Prequalification (among construction-related professional service firms);
- Insurance requirements (among all industries combined);
- Large project sizes (among all industries combined);
- Learning about bid opportunities with State agencies in Colorado (among construction-related professional service, other professional service, goods and other service firms);
- Learning about bid opportunities in the private sector (among firms in all study industries);
- Learning about subcontracting or subconsulting opportunities (among construction and construction-related professional service firms);
- Receiving payment from Colorado State agencies (among all industries combined);
- Receiving payment from prime contractors (among construction firms);
- Receiving payment from other customers (among construction, construction-related professional services and goods firms); and
- Obtaining approval from inspectors or prime contractors (among construction-related professional service firms).

According to the survey results, relatively more MBEs than majority-owned firms faced difficulties related to:

- Prequalification (among construction firms);
- Learning about bid opportunities with State agencies in Colorado (among construction firms);
- Receiving payment from prime contractors (among construction-related professional service firms); and
- Obtaining approval from inspectors or prime contractors (among construction firms).

WBEs were more likely than majority-owned firms to indicate difficulties related to receiving payment from other customers (among other service firms).

Additionally, information on barriers in the marketplace collected in the availability survey indicated that relatively more firms owned by persons with disabilities than all others faced difficulties related to the following:

- Prequalification (among construction and construction-related professional service firms combined);
- Large project size (among all industries combined);
- Learning about bid opportunities with State agencies in Colorado (among all industries combined);
- Learning about bid opportunities in the private sector (among all industries combined);
- Learning about subcontracting and subconsulting opportunities (among construction and construction-related professional service firms combined); and
- Receiving payment from Colorado State agencies (among all industries combined).

In summary, analysis of many different data sources and measures indicates evidence of disparities in some marketplace outcomes and some evidence of barriers for firms owned by minorities, women and persons with disabilities in Colorado.

APPENDIX I.

Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2014–2018 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau;
- The 2016 Annual Survey of Entrepreneurs (ASE), conducted by the U.S. Census Bureau;
- The 2018 Annual Business Survey, conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

A. U.S. Census Bureau American Community Survey PUMS Data

Focusing on the study industries, Keen Independent used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.¹ For the analyses contained in this report, the study team used the 2014–2018 five-year ACS sample.

¹ Ruggles, S., Flood, S., Goeken, R., Grover, J., Meyer, E., Pacas, J., and Sobek, M., IPUMS USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2019. <https://doi.org/10.18128/D010.V9.0>

2014–2018 American Community Survey. The study team examined ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.² Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. Currently, these surveys cover roughly 1 percent of the population per year. The 2014–2018 ACS five-year estimates represent average characteristics over the five-year period of time and correspond to roughly 5 percent of the population. For Colorado, the 2014–2018 ACS dataset includes 272,598 observations which — according to person-level weights — represent about 5.5 million individuals.

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into six groups:

- African American;
- Asian American;
- Hispanic American;
- Native American;
- Other minority (unspecified); and
- Non-Hispanic white.

The study team created the race definitions using a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. Using the rank ordering methodology, an individual who identified multiple races or ethnicities was placed in the reported category with the highest ranking in the study team’s ordering. African American was first, followed by Native American and then Asian American. For example, if an individual identified herself as “Korean,” she was placed in the Asian American category. If the individual identified herself as “Korean” in combination with “Black,” the individual was considered African American.

- The Asian American category included both Asian-Pacific Americans and Subcontinent Asian Americans. The following race groups were considered Asian American: Asian Indian (Hindu), Bangladeshi, Bhutanese, Burmese, Cambodian, Chamorro, Chinese, Fijian, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Nepalis, Pakistani, Samoan, Sri Lankan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

² U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing, 2009. Available at https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf

- The Native American group included those individuals as well as American Indians, Eskimos, Aleuts, and Hawaiians of Polynesian descent.
- 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.

Persons with disabilities. Keen Independent included disability status in analyses where sample sizes were sufficiently large. Individuals were considered to have a disability if they reported:

- Cognitive difficulty, such as difficulties learning, remembering, concentrating or making decisions (variable DIFFREM);
- Difficulty with physical activity, such as walking, climbing stairs, reaching, lifting or carrying (variable DIFFPHYS);
- Difficulty performing basic activities outside of the home alone due to a condition lasting six months or more (not including temporary health conditions such as broken bones or pregnancies) (variable DIFFMOB);
- Difficulty taking care of their own personal needs, such as bathing or moving inside the home, due to a condition lasting six months or more (not including temporary health conditions) (variable DIFFCARE); and
- A long-lasting condition of blindness, deafness, or a severe vision or hearing impairment (variable DIFFSENS).

Education variables. The study team used the variable indicating respondents’ highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate degree, and bachelor’s degree or higher.³

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of households living in dwellings owned free and clear, and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2014–2018 ACS, home value is a continuous variable (rounded to the nearest \$1,000) and median estimation is straightforward.

³ In the 1940–1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

Definition of workers. Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

Business ownership. The study team used the Census-detailed “class of worker” variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

Figure I-1.
Class of worker variable
code in the 2014–2018
ACS

Source:
Keen Independent Research from
the IPUMS program:
<http://usa.ipums.org/usa/>.

Description	2014–2018 ACS CLASSWKD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Business earnings. The study team used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners age 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on six industries: construction, construction-related professional services, other professional services, goods, other services and brokerage and investment. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.

2014–2018 Census industry codes used for construction, construction-related professional services, other professional services, goods, other services, and brokerage and investment

Study industry	2014–2018 ACS IND codes	Description
Construction	0770	Construction industry
Construction-related professional services	7290	Architectural, engineering and related services
Other professional services	6695, 7270, 7280, 7370, 7380, 7390, 7460, 7470, 7490	Data processing, hosting, and related services; legal services; accounting, tax preparation, bookkeeping, and payroll services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations, and related services; other professional, scientific, and technical services.
Goods	470, 1070, 1170, 1270, 2290, 2570, 4070, 4080, 4090, 4170, 4180, 4195, 4265, 4280, 4290, 4370, 4390, 4470, 4480, 4490, 4570, 4580, 4590, 4670, 4680, 4870, 5480, 5680	Nonmetallic mineral mining and quarrying; animal food, grain and oilseed milling; dairy product manufacturing; bakeries and tortilla manufacturing, except retail bakeries; industrial and miscellaneous chemicals; cement, concrete, lime, and gypsum product manufacturing; motor vehicle and motor vehicle parts and supplies merchant wholesalers; furniture and home furnishing merchant wholesalers; lumber and other construction materials merchant wholesalers; professional and commercial equipment and supplies merchant wholesalers; metals and minerals, except petroleum, merchant wholesalers; household appliances and electrical and electronic goods merchant wholesalers; hardware, plumbing and heating equipment, and supplies merchant wholesalers; recyclable material merchant wholesalers; miscellaneous durable goods merchant wholesalers; paper and paper products merchant wholesalers; apparel, piece goods, and notions merchant wholesalers; grocery and related product merchant wholesalers; farm product raw material merchant wholesalers; petroleum and petroleum products merchant wholesalers; farm supplies merchant wholesalers; miscellaneous nondurable goods merchant wholesalers; not specified wholesale trade; automobile dealers; other motor vehicle dealers; building material and supplies dealers; office supplies and stationery stores; fuel dealers.
Other services	1990, 6170, 6190, 6380, 7580, 7590, 7680, 7690, 7770, 7780, 7790, 8790, 8870, 9070	Printing and related support activities; truck transportation; taxi and limousine service; couriers and messengers; employment services; business support services; investigation and security services; services to buildings and dwellings (except cleaning during construction and immediately after construction); landscaping services; other administrative and other support services; waste management and remediation services; electronic and precision equipment repair and maintenance; commercial and industrial machinery and equipment repair and maintenance; drycleaning and laundry services.
Brokerage and investment	6870, 6970	Banking and related activities; securities, commodities, funds, trusts and other financial investments.

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2014–2018 ACS OCC codes used in the study team’s analyses.

Figure I-3.
2014–2018 ACS occupation codes used to examine workers in construction

2014–2018 ACS occupational title and code	Job description
Construction managers 2014-18 Code: 20, 220	Plan, direct, or coordinate, 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, budgeting, and implementation. Includes managers in specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.
Secretaries and administrative assistants, except legal, medical, and executive 2014-18 Code: 5740	Perform routine administrative functions such as drafting correspondence, scheduling appointments, organizing and maintaining paper and electronic files, or providing information to callers. Excludes legal, medical, and executive secretaries.
First-line supervisors of construction trades and extraction workers 2014-18 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, blockmasons and stonemasons 2014-18 Code: 6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block, and terra-cotta block. Construct or repair walls, partitions, arches, sewers, and other structures. Build stone structures, such as piers, walls, and abutments. Lay walks, curbstones, or special types of masonry for vats, tanks, and floors.
Carpenters 2014-18 Code: 6230	Construct, erect, install, or repair structures and fixtures made of wood and comparable materials, such as concrete forms. Build frameworks, including partitions, joists, studding, and rafters; and wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 2014-18 Code: 6240	Lay and install carpet from rolls or blocks on floors. Install padding and trim flooring materials. Apply blocks, strips, or sheets of shock-absorbing, sound-deadening, or decorative coverings to floors. Scrape and sand wooden floors to smooth surfaces using floor scraper and floor sanding machine and apply coats of finish. Apply hard tile, stone, and comparable materials to walls, floors, ceilings, countertops, and roof decks.
Cement masons, concrete finishers and terrazzo workers 2014-18 Code: 6250	<p><i>Cement Masons and Concrete Finishers.</i> Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks, roads, or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs, or gutters; patch voids; and use saws to cut expansion joints.</p> <p><i>Terrazzo Workers and Finishers.</i> Apply a mixture of cement, sand, pigment, or marble chips to floors, stairways, and cabinet fixtures to fashion durable and decorative surfaces.</p>

Figure I-3 (continued).

2014–2018 ACS occupation codes used to examine workers in construction

2014–2018 ACS occupational title and code	Job description
Construction laborers 2014-18 Code: 6260	Perform tasks involving physical labor at construction 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, and clean up rubble, debris, and other waste materials. May assist other craft workers. Construction laborers who primarily assist a particular craft worker are classified under "Helpers, Construction Trades."
Construction equipment operators 2014-18 Code: 6305	<p><i>Paving, Surfacing, and Tamping Equipment Operators.</i> Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways or for tamping gravel, dirt, or other materials. Includes concrete and asphalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators.</p> <p><i>Pile Driver Operators.</i> Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures such as buildings, bridges, and piers.</p> <p><i>Operating Engineers and Other Construction Equipment Operators.</i> 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. May repair and maintain equipment in addition to other duties.</p>
Drywall installers, ceiling tile installers and tapers 2014-18 Code: 6330	Apply plasterboard or other wallboard to ceilings or interior walls of buildings. Apply or mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound. Seal joints between plasterboard or other wallboard to prepare wall surface for painting or papering.
Electricians 2014-18 Code: 6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems.
Glaziers 2014-18 Code: 6360	Install glass in windows, skylights, store fronts, and display cases, or on surfaces, such as building fronts, interior walls, ceilings, and tabletops.
Painters and paperhangers 2014-18 Code: 6410	<p><i>Painters, construction and maintenance.</i> Paint walls, equipment, buildings, bridges, and other structural surfaces, using brushes, rollers, and spray guns.</p> <p><i>Paperhangers.</i> Cover interior walls or ceilings of rooms with decorative wallpaper or fabric or attach advertising posters on surfaces such as walls and billboards. May remove old materials or prepare surfaces to be papered.</p>
Pipelayers 2014-18 Code: 6441	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.
Plumbers, pipefitters and steamfitters 2014-18 Code: 6442	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 sprinkler fitters.

Figure I-3 (continued).

2014–2018 ACS occupation codes used to examine workers in construction

2014–2018 ACS occupational title and code	Job description
Roofers 2014-18 Code: 6515	Cover roofs of structures with shingles, slate, asphalt, aluminum, wood, or related materials. May spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures.
Sheet Metal Workers 2014-18 Code: 6520	Fabricate, assemble, install, and repair sheet metal products and equipment, such as ducts, control boxes, drainpipes, and furnace casings. Work may involve any of the following: setting up and operating fabricating machines to cut, bend, and straighten sheet metal; shaping metal over anvils, blocks, or forms using hammer; operating soldering and welding equipment to join sheet metal parts; or inspecting, assembling, and smoothing seams and joints of burred surfaces. Includes sheet metal duct installers who install prefabricated sheet metal ducts used for heating, air conditioning, or other purposes.
Structural iron and steel workers 2014-18 Code: 6530	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.
Helpers, construction trades 2014-18 Code: 6600	All construction trades helpers not listed separately.
Fence erectors 2014-18 Code: 6710	Erect and repair fences and fence gates, using hand and power tools.
Welding, soldering, and brazing workers 2014-2018 Code: 8740	<p><i>Welders, Cutters, Solderers, and Brazers.</i> Use hand-welding, flame-cutting, hand-soldering, or brazing equipment to weld or join metal components or to fill holes, indentations, or seams of fabricated metal products.</p> <p><i>Welding, Soldering, and Brazing Machine Setters, Operators, and Tenders.</i> Set up, operate, or tend welding, soldering, or brazing machines or robots that weld, braze, solder, or heat treat metal products, components, or assemblies. Includes workers who operate laser cutters or laser-beam machines.</p>
Driver/sales workers and truck drivers 2014-18 Code: 9130	<p><i>Driver/sales workers.</i> Drive truck or other vehicle over established routes or within an established territory and sell or deliver goods, such as food products, including restaurant take-out items, or pick up or deliver items such as commercial laundry. May also take orders, collect payment, or stock merchandise at point of delivery.</p> <p><i>Heavy and Tractor-Trailer Truck Drivers.</i> Drive a tractor-trailer combination or a truck with a capacity of at least 26,001 pounds Gross Vehicle Weight (GVW). May be required to unload truck. Requires commercial drivers' license. Includes tow truck drivers. Excludes "Refuse and Recyclable Material Collectors" (53-7081).</p> <p><i>Light Truck Drivers.</i> Drive a light vehicle, such as a truck or van, with a capacity of less than 26,001 pounds Gross Vehicle Weight (GVW), primarily to pick up merchandise or packages from a distribution center and deliver. May load and unload vehicle. Excludes "Couriers and Messengers" (43-5021) and "Driver/Sales Workers" (53-3031).</p>

B. Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The U.S. Census Bureau conducted the SBO every five years but stopped after 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, architecture and engineering, and food, beverage and selected retail.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as women-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian-Pacific or Native Hawaiians, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Native or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories are not available by both race and ethnicity, so race and ethnicity were analyzed independently. The study team reported business receipts for the following racial, ethnic and gender groups according to Census Bureau definitions:

- Racial groups — African Americans, Asian Americans, Asian-Pacific or Native Hawaiians, Subcontinent Asian American, American Indian or Alaska Native, other minority groups and whites.
- Ethnic groups — Hispanic Americans and non-Hispanics.
- Gender groups — men and women.

C. Annual Survey of Entrepreneurs (ASE) Data

Keen Independent analyzed selected economic and demographic characteristics for business owners collected through the ASE. The ASE includes nonfarm businesses that file tax forms as individual proprietorships, partnerships or any type of corporation, have paid employees, and have receipts of \$1,000 or more. Unlike the SBO, the ASE samples only firms with paid employees (the SBO includes both employer firms and non-employer firms). The 2016 ASE sampled approximately 290,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

The ASE collects information on businesses as well as business ownership (defined as having 51 percent or more of the stock or equity in the business). Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories in the ASE are the same as those used in SBO and Census data. Because ethnicity is reported separately and respondents have the option of selecting one or more racial groups when reporting business ownership, all ASE calculations use non-mutually exclusive race/ethnicity definitions.

Topics within the ASE include some business information covered in the SBO, as well as information relating to the businesses' sources of capital and financing. Keen Independent used ASE data to analyze main sources of capital used to start or acquire a firm, firms that secured business loans from a bank or financial institution, firms that avoided additional financing because they did not think the business would be approved by lender, and firms that cited access to financial capital as negatively impacting the profitability of their business. Analyses included comparisons across race/ethnicity and gender groups.

D. Annual Business Survey (ABS) Data

Keen Independent used 2018 ABS data to examine sources of capital used to start or acquire a business. The 2018 Annual Business Survey (ABS) is a recent collaborative effort between the Census Bureau and the National Science Foundation (NSF). The ABS includes a variety of topics, as it replaces both the ASE and SBO, as well as the Business R&D and Innovation for Microbusiness (BRDI-M) and the innovation section of the Business R&D and Innovation Survey (BRDI-S) surveys. However, the marketplace analyses continue to use data from the ASE and SBO because the 2018 ABS data released for public use is limited and does not provide sufficient detail for the analyses.

The 2018 ABS data were collected in 2018 but refer to conditions in 2017. The ABS includes all nonfarm employer businesses filing the 941, 944 or 1120 tax forms. This survey is conducted on a company or firm basis rather than an establishment basis. The 2018 ABS sampled approximately 300,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

Like the ASE, the ABS collects business ownership information. Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories provided in the ABS are the same as those provided in ASE, SBO and Census data.

E. Home Mortgage Disclosure Act (HMDA) Data

The study team analyzed mortgage lending in Colorado using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2018 HMDA data if they had assets of more than \$45 million on the preceding December 31 (\$42 million for 2013 and \$44 million for 2017), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either (a) exceeding 10 percent of all loan originations in the past year or (b) exceeding \$25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team used those data to examine differences in racial and ethnic groups for loan denial rates and subprime lending rates in 2013, 2017 and 2018. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.

Qualitative Information from In-Depth Interviews, Availability Surveys and Other Comments

Appendix J presents qualitative information that Keen Independent collected as part of the 2020 Disparity Study. It is based on input from more than 700 business owners, trade association representatives, focus group participants and others (including 92 in-depth interviews and 23 focus group participants). Appendix J includes six parts:

- A. Introduction and methodology;
- B. Background on the firm and industry;
- C. Working on Projects with the State of Colorado and other Public Agencies;
- D. Conditions in the Colorado marketplace for Historically Underutilized Businesses (HUBs) including businesses owned by people of color, women, persons with physical or mental disabilities and members of the LGBT community;
- E. Insights regarding programs and certification; and
- F. Recommendations for the State of Colorado and other public agencies.

A. Introduction and Methodology

From January through August 2020, the Keen Independent study team gathered public input through 92 in-depth interviews and four virtual focus groups. Keen Independent also analyzed open-ended responses from the telephone, online and fax availability surveys as well as any public comments submitted via telephone, email, mail and other means.¹

For easy public access throughout the study, Keen Independent hosted a designated telephone hotline and study email address and website.²

Keen Independent's robust outreach efforts offered business owners and representatives the opportunity to provide input on the disparity study, as well as their experiences with the State of Colorado and other public agencies in the Colorado marketplace.

The study team examined conditions in the construction, construction-related professional services, brokerage and investment, other professional services, goods and other services industries.

¹ For anonymity, in-depth interviewees are coded as #I-01, #I-02 and so on, focus group participants are coded as a #FGs, organizations including trade and industry associations and chambers are coded as #TOs, and availability survey respondents' open-ended comments are coded with a #AS.

² 720-306-8486; Coloradodisparitystudy2020@keenindependent.com; www.keenindependent.com/coloradodisparitystudy2020

B. Background on the Firm and Industry

The Keen Independent study team asked business owners to report on their business history and industry. Topics included:

- Business history;
- Challenges to starting, sustaining and growing a business in the industry, and any barriers to entry;
- Business size, and any expansion and contraction over time;
- Type of work and any changes over time;
- Sizes of contracts;
- Geographic scope and any changes over time;
- Public or private sector, or both, and preferences/experiences in each;
- Prime or subcontractor/subconsultant;
- Current conditions for firms in the Colorado marketplace;
- Keys to business success; and
- Measures of success.

Business history. The Keen Independent study team asked interviewees about their business start-up history and experience in the industry.

Business owners and representatives of construction, construction-related professional services, brokerage and investment, other professional services, goods and other services firms discussed business start-up and entry into the industry. For example:

- Having worked previously as an independent contractor, a white female owner of a WBE professional services firm reported, "... two out of the three organizations that I worked for were owned by men and they were larger companies" She added that "there wasn't a lot of room" for her own input, prompting her to start her own company. She added that she has been in business over 10 years. [#I-01]
- Reporting on barriers to entry into her industry, a Hispanic American female owner of a professional services firm commented, "To be in this industry ... there was no way for me to move up without starting my own company" [#I-66]
- Regarding start-up of his firm, an Asian American owner of an ESB/DBE construction-related firm reported that he started the firm because "other, bigger firms were starting to grow out of their DBE status." He added, "We figured it was a good opportunity to jump on that niche." [#I-12]
- The white male part owner of a WBE construction-related professional services firm commented, "When we bought the company ... we did about 10 percent more revenue than the previous owners did We grew the business in basically seven months ... [and] tripled the business in three years." [#I-16]

- An African American part owner of a certified (ESB, MWBE, DBE) construction-related firm reported, “I was working for a construction company at the time I have a passion for creating and building things ... it was a natural gravitation [to] construction I took [all of my savings] and started” [#I-18]
- Reporting on his desire to work for himself, a white male owner of a professional services firm reported, “The goal was to work for myself and to provide more comprehensive services” [#I-23]
- Regarding business history, an African American male representative of a minority-owned professional services firm reported that the Colorado-based firm was founded recently, with one of its owners having operated another business for many years. This business representative explained that the firm he currently represents grew out of that owner’s first business. [#I-75a]
- Representatives of a business chamber and business advocacy organization reported that its members primarily built or operated businesses in the services industry with about 50 percent identifying as LGBTQ-owned. Another representative of a trade association reported that his membership represents every industry, commenting, “We have 106,000 supporters across the state LGBTQ folks and allies ... some of whom are also business owners.” [#TO-09b, #TO-09a, #TO-11]

Most business owners reported prior experience in the industries in which they started their firms.

[e.g., #I-06, #I-08, #I-22, #I-27, #I-30, #I-32, #I-33, #I-34, #I-35, #I-37, #I-38, #I-41, #I-42, #I-44, #I-48, #I-58, #I-63, #I-66, #I-68, #I-71, #I-72, #I-74, #I-75a, #I-76, #I-78, #I-80] Comments include:

- The white part owner of a professional services firm reported having experience in the industry before starting the firm. He added, “I was tired of working for someone else Being underpaid and overworked motivated me to start my own business.” [#I-29]
- Regarding work experience, the part owner of a WBE/ESB professional services firm reported that he previously worked for a firm in the same industry. He commented, “When I was let go, a couple of local [professional services] firms reached out to me and [offered to engage me if I went into business myself].” [#I-36]

Some business owners reported engaging in business partnerships or purchasing firms from family.

A few interviewees acquired family businesses or partnered with a colleague. These include:

- A Native American owner of a DBE construction-related firm reported that the firm was established over several decades ago as a partnership, sharing initial capital investment and working part-time to build the firm. [#I-07]
- The white owner of a construction-related firm and member of the LGBT community reported that he acquired his firm from his parents. [#I-79]
- An African American owner of a DBE and SDVOSB construction-related firm indicated that he purchased the firm from his father. [#I-09]

Challenges to starting, sustaining and growing a business in the industry and any barriers to entry. The study team asked business owners and representatives to report on their experiences starting, sustaining and growing their firms in Colorado.

Many business owners and representatives reported barriers at start-up and beyond that were particularly challenging for minority- and women-owned businesses and other HUBs. [e.g., #FG-01f, #I-02, , #I-06, #I-09, #I-13, #I-16, #I-22, #I-33, #I-35, #I-42, #I-52, #I-62, #I-65, #I-68, #I-73, #I-74, #I-76, #I-80, #TO-07, #TO-09a, #TO-11]

A number of business owners reported challenges gaining the competencies, training and experience needed to successfully operate a business in their industries. These included:

- A white female representative of an Asian American-owned DBE professional services firm reported challenges in performing all the “roles” needed to run the business. [#I-50]
- “The biggest challenge is acquiring the competencies needed to run a business,” remarked an Asian American male owner of an MBE construction-related firm. [#I-46]
- Regarding barriers to entry into his industry, the white male owner of an ESB professional services firm reported, “Your biggest barrier to entry is having the qualifications ... being a licensed professional [in specified field] That’s the biggest barrier to entry ... your education and experience.” [#I-34]
- The white female owner of a professional services firm reported that the biggest challenge for her was building experience. [#I-60]
- Another white female owner of a professional services firm indicated that it was difficult for her to find someone to train her in the industry. She added that the process to become licensed in her industry included 2,000 hours of direct mentorship in the State of Colorado. [#I-04]

Some business owners and representatives added that lack of business acumen and resources is a barrier for firms trying to enter many industries. Comments include:

- The African American female representative of a minority chamber reported that a lack of relationships and lack of expertise in certain skill sets are barriers to entry. She added that the transition from segregation to integration is also a barrier. [#TO-04]
- Lack of experience was challenging for an African American part owner of a certified (ESB, MWBE, DBE) construction-related firm. He said, “Even though I had construction experience, [potential customers said], ‘The business is not established long enough,’ or ‘Well, you don’t have bonding ... have finances [or] you can’t do this job’” He went on to comment, “How am I going to get a job like this if I don’t have the opportunity for any job?” [#I-18]

Many business owners reported difficulty building clients, securing contracts and establishing a name in the industry, particularly when “new” to the playing field. These comments include:

- The white female president of a DBE professional services firm reported that getting “her name out there” was difficult, and that marketing, developing and selling the brand is an ongoing challenge. [#I-11]
- An African American female partial owner of a professional services firm reported that as a start-up firm, the largest challenge was name recognition and low-cost marketing. [#I-51]
- The white female representative of an Asian American-owned DBE professional services firm reported that at start-up the business faced challenges establishing clientele. [#I-50]
- “The biggest challenge was getting the business up and running and getting contracts with various companies and government agencies,” remarked a white female owner of a professional services firm. [#I-54]
- Reporting on marketing, the white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported challenges developing the connections to get the firm’s name out. [#I-21]
- A focus group participant, a female representative of a construction trade association, commented that those who start their own business after working for a large prime contractor are often surprised by how difficult it is to make a name for themselves, even with that past experience. [#FG-04b]
- The white female owner of a DBE/ESB professional services firm remarked that finding primes to secure work with was a barrier to entry into her industry. She reported, “It was surprising how hard it is to find out who ... to subcontract under.” [#I-61]
- One white female owner of a WBE services firm reported, “Being brand new in [the] industry was a struggle” [#I-24]

Many business owners and representatives reported deficiencies in marketing know-how and follow-through. [e.g., #AS-04, #AS-40, #AS-55, #AS-61, #AS-86, #AS-214, #AS-250, #AS-252, #AS-306, #AS-307, #AS-308, #AS-309, #AS-310, #AS-311, #AS-312, #AS-313, #AS-318, #I-40, #I-60] Related comments follow:

- When surveyed, an African American male owner of a professional services firm reported that having the ability to advertise and market his firm is challenging. [#AS-20]

- Regarding challenges to starting, sustaining and growing a business in the industry, an African American male owner of a professional services firm reported, “Marketing and finding opportunities ... the problem was people with marketing gimmicks” [#I-17]
- When surveyed, an Asian American female representative of a small professional services firm commented, “Marketing is hard with three people.” [#AS-605]
- “Finding employees, marketing and training is a challenge,” reported the white male owner of a DBE professional services firm. [#I-32]
- The white owner of a professional services firm reported that “continuing to find enough work” is challenging, even more so in “this economy.” He commented, “I am not the best at ... marketing myself, so finding more clients has been a bit of a challenge.” [#I-42]

Some reported challenges building equity needed to start and sustain their businesses.

A number of business owners relied on home equity loans, personal loans, lines of credit or financial assistance from colleagues and family to build capital. For example:

- The white male representative of a chamber of commerce reported access to capital as the most important component to business success, both before/after the pandemic. [#TO-01]
- An African American female representative of a minority chamber reported, “The number one challenge for any business is ... access to capital That’s particularly important for Black businesses because they don’t always have a relationship with a financial institution [to] fall back on [for funding].” [#TO-04]
- A Hispanic American female part owner of an SBE/MBE/WBE/DBE construction-related firm reported that her firm was started with \$7,000, “a big housing loan” and an \$80,000 line of credit. [#I-14]
- The white female representative of a certified (WBE, DBE, ESB, SBE) professional services firm reported that she was advised to get a small business line of credit but was told that her business needed to be in operation longer to qualify. She reported that she then obtained an unsecured personal loan. [#I-02]
- One veteran owner of a professional services firm reported, “I think that the biggest challenge that I faced was lack of equity” [#I-58]
- When interviewed, the white male owner of a construction-related firm reported, “I used my credit cards to start it up. I was young and stupid Building that cushion of cash takes a long time, and it’s hard.” [#I-48]

- The white female owner of a professional services firm said that although about 25 percent of her start-up capital was through an SBA loan, she had to rely mostly on her husband’s retirement and other personal assets to keep the business afloat. [#I-44]
- One Hispanic American female owner of a professional services firm reported, “There’s no access to capital that I [could find] ... I pretty much had to pull from savings, and I got a loan from family.” She added, “The first couple months waiting for that contract to go through was difficult.” [#I-66]
- “Most of the work that is done is capital intensive, so you need a certain amount of access to capital to get into it,” commented the white male representative of an industry association. [#TO-06]
- The white female representative of an industry association reported that access to capital is a challenge for firms her association represents. She explained, “Because of generational wealth that is held more by white families and white entrepreneurs and white business owners, it’s much easier in general for them to have access to capital from friends and family, whereas a lot of [minority] entrepreneurs ... they don’t have that network to tap, so for them to be able to start up their business, already there are hurdles ... but because race and class are so tied together still, you also see it manifest in incubator programs.” [#TO-08]

A Hispanic American male owner of a professional services firm stressed the importance of family funds in starting a business and stated that many, especially minorities, do not have the opportunity to form a business and innovate without that form of start-up capital. He remarked, “People are expected to dip into their families to get their start-up capital. When coming from a minority family background, there tends not to be that capital You couldn’t go anywhere if your family didn’t have money.” [#I-73]

When asked what potential entrepreneurs do without access to start-up capital, the same business owner commented, “A lot of them just don’t move forward and stay in the job they have because there are not opportunities to jump out of that. People just stay in the hamster wheel.” [#I-73]

For most minority- and women-owned businesses and other small businesses, access to financing is difficult. [e.g., #AS-08, #AS-09, #AS-10, #AS-11, #AS-12, #AS-13, #AS-42, #AS-60, #AS-67, #AS-68, #AS-114, #AS-141-#AS-147-#AS-148, #AS-149, #AS-150#AS-151, #AS-152, #AS-176, #AS-177, #AS-178, #AS-185, #AS-187, #AS-229, #AS-277, #AS-278, #AS-279, #AS-290, #AS-316, #AS-317, #AS-377, #AS-411, #AS-451, #AS-530, #AS-571, #AS-589, #AS-596, #AS-599, #AS-610, #AS-613, #AS-630, #AS-636, #AS-637, #AS-646, #AS-648, #AS-659, #AS-706, #I-34, , #I-38, #I-56, #I-59, #TO-02, #TO-12]

Limited access to loans combined with limited understanding of how to secure financing challenged many minority- and women-owned businesses and other small businesses interviewed. “Newness” of the business made it even more difficult for some to obtain financing. Comments follow:

- A white female representative of a services firm commented, “Catch-22 ... we are funding ourselves with credit [cards] and savings, but if we could get a loan, it would have to use the business as collateral” [#AS-69]
- The white female representative of an industry association reported, “Credit scores are another barrier [for HUBs] because if they are unable to [build] capital, the rates are going to be much higher” [#TO-08]
- The Hispanic American male owner of a services firm reported, “It is difficult to understand the monopoly unless you have big capital ... banks do not provide loans on potential of the business” [#AS-126]
- One white male representative of a chamber of commerce commented, “You could have the most brilliant business plan ... if you can’t finance it, it’s not going to do you any good” [#TO-01]
- The white male part owner of a construction-related firm reported, “When I started my business there was no advantage for me to get bank loans. It was done through blood, sweat and tears.” [#I-70]
- The white male veteran owner of a professional services firm reported, “... no one is willing to loan something to someone with no backing.” [#I-58]
- “A minority female business owner stated, “Applying for business loans hasn’t been good.” [#I-62]
- When surveyed, a Hispanic American male owner of another services firm reported, “Bank lending practices are geared to more mature businesses that are stable in revenues and growth” [#AS-41]
- A white female representative of a business chamber commented, “There are reasons why women don’t grow ... systematic reasons They don’t have access to funding, there’s still unconscious bias when it comes to funding, and then if you don’t have the funding, you will not be able to pay for the resources [to build a business].” [#TO-07]
- The male representative of a business advocacy organization explained, “A lot of it is ... whether you have access to the knowledge bases [and] access to capital or the collateral to take out [a] loan.” [#TO-11]

- An African American part owner of a DBE/MBE/WBE construction-related firm reported that despite the recent years of increased business, his firm has never been granted a loan. He mentioned seeing advertising everywhere for new-firm financing but noted that such loans are not given to firms in his position. Instead, he said that loans are granted to well-established businesses with great credit. [#I-08]

This same business owner commented, “A small business loan or a start-up loan, all those things that are out there that you’re supposed to be able to get as a small business owner, those things are not there for you. Your credit is always a factor to everything, as is your time. That’s why the banks just don’t deal with you.” [#I-08]

Several business owners reported other financial challenges such as difficulty sustaining a healthy cash flow, particularly when faced with slow customer payments. [e.g., #I-01, #I-33, #I-36]

For example:

- A Hispanic American female representative of a minority industry association reported that members face financial barriers that make meeting contract requirements a challenge. [#IO-03]
- The white owner of a professional services firm reported that finding clients to maintain cash flow can be challenging. He commented, “Once you find a client, the next challenge is to have them pay you on time ... so you have to have a little bit of savings to get over that hurdle.” [#I-23]

Another interviewee, the part owner of a WBE/ESB professional services firm, reported that having to win work quickly to stay afloat was a challenge. He added, “Probably the biggest challenge for me is [that] for most projects or contracts I chase, I am a subcontractor to a larger engineering firm or construction company I am kind of at their mercy [for work and payment].” [#I-36]

- An African American male owner of a DBE, SDVOSB (and other certifications) construction-related firm commented, “It has to do with cash flow” [#I-09]
- When interviewed, the white male owner of a construction-related firm reported that cash flow is the real problem. [Specialty equipment costs] can all add up ... quickly into the thousands.” [#I-48]
- While being interviewed, an Asian American female owner of a DBE professional services firm described the importance of long-term financing in staying afloat. She reported that the City of Denver is encouraging small businesses to establish “capital expenditures accounts” to survive in between paychecks. She remarked, “Cash flow is always a problem you have to have a capital expenditures account to make it through paycheck to paycheck.” [#I-10]

Securing bonding and insurance is challenging for many business owners. [e.g., #AS-15, #AS-18, #AS-59, #AS-87, #AS-200, #AS-202, #AS-203, #AS-204, #AS-225, #AS-240, #AS-241, #AS-242, #AS-243, #AS-473, #AS-545, #AS-567, #I-13, #I-14, #I-18, #I-40, #I-54, #I-57, #I-68, #I-03, #I-39, #I-52, #TO-02, #TO-03, #TO-04] For example, an African American male owner of a professional services firm remarked that high insurance requirements relative to the cost of a project can be a barrier for small firms. [#FG-04a] Other comments follow:

- One Hispanic American male representative of a Hispanic American female-owned construction firm reported not knowing how to get bonding or where to go for bonding assistance. [#AS-213]
- A Native American owner of a DBE construction-related firm reported that bonding has been a big challenge for his firm. [#I-07]
- The African American owner of a DBE, SDVOSB (and other certifications) construction-related firm said that contract range is the sole factor driving his firm's capacity to secure bonds. As a result, he explained that he tends to look for contracts in a lower price range; while he has completed contracts up to \$200,000, he usually shoots for contracts around \$10,000. [#I-09]
- Regarding bonding, the African American owner of a DBE construction-related firm reported that the director of an agency wanted his firm for a large project; however, he was unable to secure the contract after he failed to secure requisite bonding (due to issues with a bank manager). [#I-09]

The same business owner went on to say, "We lost a \$1 million contract ... we had an asset to use as backup and they wouldn't do it We had to have backing from our bank, and they wouldn't do it [despite having collateral]." [#I-09]

- "Businesses have to consider bonding [when seeking new opportunities] because they don't have that capacity [to secure bonding]," commented a female representative of a minority business organization. [#TO-05a]
- The white representative of a chamber of commerce reported that bonding creates challenges for members. He commented, "[Not] break[ing] the bond into pieces if you're doing a construction project, and ... need[ing] that bonding up front ... that affects companies immensely." [#TO-01]
- An African American male part owner of a DBE/MBE/WBE construction-related firm reported a "catch-22" with bonding. He explained, "These companies don't want to do business without a bond, but the bonding companies don't want to do business with a new business!" [#I-08]
- One representative of an industry association indicated that bonding agencies holding retainages is a barrier for many small businesses and they can do better to release retainage in a timely manner. [#FG-04b]

- Some other small business owners reported barriers to obtaining professional liability insurance or health insurance. One explained, for example, “You got to make enough money to eat and pay for insurance.” Another reported difficulty establishing affordable health insurance for his small company. [#AS-201, #I-13]
- A white female representative of an industry association reported that insurance can be a barrier. She remarked, “We work really hard to help our members who want to hire marginalized workers We heard from businesses that their insurance companies wanted to charge them more for a policy that would cover [marginalized] employees even though there’s a federal program that provides some coverage, so I do think insurance in certain situations can be a barrier.” She also concluded that health insurance is a “huge” barrier. [#TO-08]
- A white president of a professional services firm reported that he no longer performs engineering services because of the high cost of professional liability insurance in his industry. [#I-13]

Several business owners reported that being new to the area or having language barriers and other cultural challenges made building a business in Colorado difficult. For example:

- The Asian American part owner of a certified (DBE, MBE and others) professional services firm reported that he was born outside of the country and, due to his foreign status, had to, “. . . persist . . . until they accept you.” He added that it took many years to prove that he was reliable and could do the work. [#I-03]
- A language barrier was a challenge for a Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm when starting her business. She added, “I couldn’t get any help from the Hispanic community, so I got very close to the African community They really helped me, I really appreciate their help . . . I always was involved in the African construction community” [#I-14]
- The Asian American male owner of an ESB/DBE construction-related firm reported that discrimination and language barriers can be challenges to HUBs. [#I-12]
- When interviewed, a Hispanic American female representative of a minority representation industry association reported on language barriers specific to Hispanic Americans. [#TO-03]
- Regarding language barriers, a white female representative of an industry association reported that access to resources, including forms in the native language, is a challenge for some members. She commented, “We do have a lot of members who are native Spanish speakers. And even right now, we’re looking at the accuracy of translation from the SBA Disaster Loans Application forms” She added that a woman from a regional ethnic chamber described the translations as essentially a “stay at home mom order” rather than a “shelter in place order.” [#TO-08]

A few business owners reported starting businesses in Colorado in response to limited options for daycare; some reported difficulty hiring employees as a result. These women business owners indicated that childcare was the reason they started their own firms rather than work for a firm that would not accommodate childcare needs. A trade association added that limited daycare options is a challenge for many businesses seeking to hire and retain new employees. For example:

- The white female owner of a professional services firm reported that the firm where she previously worked did not accommodate her childcare needs, causing her to resign and start her own business. An Asian American female owner of a DBE professional services firm reported similarly her motivation for starting her own firm as being ability to raise children while working. [#I-74, #I-10]
- Indicating that “family friendly” is her priority, a female president of a DBE professional services firm reported that she started her business because “there wasn’t a single [professional services] firm [she had] ever worked with in [her] entire life that was family friendly.” [#I-11]
- The white representative of a chamber of commerce expanded on this indicating that many companies are struggling to hire due to the lack of daycare in the area. He explained, “Biggest problem is that we [have] no daycare [A corporation] just two months ago was offering \$40,000 signing bonuses for software engineers, and they couldn’t get any of them [because of the lack of daycare].” [#TO-01]

Business size, and any expansion and contraction over time. Some business owners reported carefully controlling the size of their firms. Many more indicated that their firm size is based on workload or fluctuates seasonally. [e.g., #I-01, #I-02, #I-05, #I-10, #I-11, #I-13, #I-35, #I-46]

Several reported no changes in size or controlled staffing with limited expansion and contraction. [e.g., #I-04, #I-26, #I-28, #I-31, #I-36, #I-42, #I-54, #I-55, #I-56, #I-74] Comments follow:

- “As a firm we don’t want to get too big ... we plan on trying to stay small so that we have a good understanding of who’s at our company and who’s working for us,” commented an Asian American male owner of an ESB/DBE construction-related firm. [#I-12]
- The white female owner of a professional services firm reported that she has always been the only employee of her firm. However, she commented that the number of contractors she hires depends on the projects in which she is involved. [#I-60]
- One white male representative of a former WBE professional services firm reported that the firm is now just slightly smaller than the largest it has ever been. He added, “We’re pretty stable. We tend to place a high priority on not being a ‘hire and fire’ firm We tend to seek out and have a lot of projects in the office at any one time, and most of the staff work on more than one project.” [#I-65]

Many business owners reported both expansion and contraction based on workload or seasonal changes in staffing from year to year. [e.g., #I-32, #I-39] For example:

- “It goes up and down ... when we are running in season, we have 32 employees ... we scale to the level of how much work we have,” remarked an African American part owner of a certified (ESB, MWBE, DBE) construction-related firm. He added, “The company grows like any other company based on the opportunities available.” [#I-18]
- The Asian American part owner of a certified (DBE, MBE) professional services firm reported that market conditions can influence expansion, contraction and need for staffing. He added that in Colorado, work is seasonal and indicated that the wintertime is a “big challenge.” [#I-03]
- When interviewed, an African American male part owner of a DBE/MBE/WBE construction-related firm reported that the firm has fluctuated between five and eight employees, depending on the workload. [#I-08]
- A Native American owner of a DBE construction-related firm reported that an average of 100 to 120 employees work for his firm. He added that firm size changes seasonally and with specific contract needs. [#I-07]
- The white male part owner of a WBE construction-related professional services firm reported that the firm hires more employees in the summer months and commented, “We are pretty constant.” [#I-16]
- One white female owner of a professional services firm reported that her business has expanded and contracted. She indicated that main contributors to her business contracting are the light rail tearing down her building and COVID-19. [#I-33]

A few business owners reported downsizing their businesses for various reasons. For example:

- Reporting on business size, an African American owner of a DBE, SDVOSB (and other certifications) construction-related firm commented that the firm had 20 employees at one time but now employs only four. He said that he attributes this reduction to the challenges of compliance with state regulations for general contractors and subcontracting. [#I-09]
- The white female part owner of a professional services firm reported to have grown steadily over the last 30 years from two to about 15 full-time employees. However, she commented that in the last several years, there has been a large decline in the volume of work which has reduced their workforce to five employees. [#I-22]

For a number of business owners, COVID-19 is impacting hiring and retention. Comments follow:

- The white female owner of a professional services firm reported that the business started with three staff. Her husband recently hired a second technician in February 2020. She reported being anxious about the potential effects of taking on an additional employee during the pandemic. [#I-44]
- “When we first started, we had four employees but now we have nine employees and we are trying to hire an additional four or five We were going to take on more employees before COVID, but we had to cancel that,” remarked the white male owner of construction-related firm. [#I-38]
- The white owner of a professional services firm reported that the firm downsized due to the COVID-19 pandemic. He went on to say that one of his employees was laid off and had to file for unemployment. [#I-52]

A few business owners continued to feel the negative effects of the Great Recession. For example, the Hispanic American partial owner of an MBE/SBE/DBE construction-related firm reported that the firm did well during the Great Recession and, as a result, saw an increase in private sector work. He explained, “We didn’t handle [the growth] ... gracefully. It was a perfect storm for our growth and then it was a perfect storm for our demise after.” [#I-67]

Some interviewees reported mostly business growth. [e.g., #I-37, #I-50] These include:

- The African American male representative of a minority-owned professional services firm reported that the firm expanded significantly this year. [#I-75a]
- “The firm has grown substantially. We’ve reached our peak last year,” reported the white male owner of a professional services firm. [#I-41]
- A Hispanic American female owner of an SBE/MWBE/DBE construction-related firm reported that the firm started with three employees and has grown to 72. She added, “In the summer we get a lot of students and we might go up to 80.” [#I-14]
- The white male representative of an ESB professional services firm indicated that his firm has grown recently attributing it to market improvement in the Western Slope region. [#I-34]
- “We have progressively grown since [the early 2000s], had to scale it back in 2008 with everything going on then, but have had a steady growth since,” remarked a white female part owner of a WBE services firm. [#I-24]

Type of work and any changes over time. The study team asked interviewees to report on the type of work their firms perform (in c construction, construction-related professional services, brokerage and investment, other professional services, goods and other services industries) and any changes over time. [e.g., #I-09, #I-12, #I-21, #I-27, #I-28, #I-33, #I-36, #I-37, #I-39, #I-43, #I-80]

- A number of interviewees reported that their firms perform largely in one industry. [e.g., #I-01, #I-03, #I-23, #I-32, #I-39, #I-41]

Many business owners and representatives reported no changes in the type of work they perform. [e.g., #I-10, #I-14, #I-16, #I-32, #I-45, #I-49, #I-67, #I-75]

- A few reported that advancements in equipment and technology have allowed their firms to expand or redirect services. For example, a white female owner of a professional services firm reported that she has expanded services as technology has advanced which has, in turn, increased the need for her expertise. [#I-04]

Another white female business owner reported that her firm has adapted to changes in the industry. She noted that despite growing competition, her firm still has specialty equipment to produce certain products more efficiently than her competitors. [#I-22]

- Several organizations reported on changes in work type among the businesses they represent. [e.g., #TO-04, #TO-10] For example, the white male representative of an industry association reported that a lot of the work types performed by the membership have remained the same over time. [#TO-06]

On the other hand, a white female representative of a minority chamber stated, “I noticed when I started there were a lot of ‘hobby businesses’ [among members] I’ve noticed a shift into tech and construction, not just service-type businesses, but product and large-scale operative businesses.” [#TO-07]

Sizes of contracts. The study team asked business owners to report on the sizes of contracts they typically perform.

Business owners and representatives discussed the scale of contracts performed and how and where opportunities arise. For example:

- Some business owners indicated a range of contract sizes. For instance, the white female owner of a WBE professional services firm commented that the contracts the firm works on range from small contracts to large government contracts. [#I-01]
- The African American part owner of a certified (ESB, MWBE, DBE) construction-related firm reported, “We started off with ... smaller jobs, just to get the company up and running and build the experience of the company.” He added, “As the company grew, we got into more sophisticated jobs.” [#I-18]

- Reporting on sizes of projects that the firm performs, an Asian American female owner of a DBE professional services firm reported that she looks for \$100,000 projects at minimum. [#I-10]
- “That scale varies quite a bit We do have some general contractors in our midst, but we’re not the AGCs of the world where they’re getting ... \$5 million construction contracts to go out and build ... a developer’s new complex,” commented the white male representative of an industry association. [#TO-10]

The same association representative went on to say, “Backing up a bit, one of the other ... barriers to entry right now [and] challenges in the marketplace is the availability of land or title land” [#TO-10]

- Several business owners commented on the challenges associated with taking the next step. A Hispanic American male partial owner of an MBE/SBE/ACDBE/DBE construction-related firm remarked, “If your intentions are to participate in that next tier of contract size and value, cash and access to capital is a huge burden.” [#I-67]

Another business owner (a Native American owner of a DBE construction-related firm) stated, “Our bonding capacity is \$100 million in aggregate We would struggle with a job of that size right now and typically for us, we are looking for small business set-asides, Indian small business set-asides ... things we have an advantage in ... where there is not so much competition.” [#I-07]

- A representative of a state agency reported that there are opportunities for small businesses, and IT businesses specifically, to be distributors on larger contracts. He added that some suppliers have their own supplier diversity programs. [#FG-03b]

The same agency representative went on to say that he got a small business “linked up” with a large firm and was able to distribute their product “on a worldwide basis.” He continued, “... there are opportunities They’re kind of limited but do exist.” [#FG-03b]

The study team interviewed business owners performing a range of contract budgets.

[e.g., #I-13, #TO-8, #TO-10] For many that range is significant, for example:

- Some business owners interviewed reported construction-related contracts in the \$2,000 to \$2 million range. For example, an African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that the firm’s contracts typically range from \$5,000 to \$1 million. [#I-18]

A white female owner of a DBE/ESB/WOSB construction-related firm remarked that her contracts can range from \$100,000 to \$1.5 million. [#I-21]

- An Asian American male owner an MBE/DBE professional services firm reported to have worked on construction projects valued at \$10,000 to 25 million. [#I-06]

The African American male and white male representatives of a minority-owned professional services firm reported that the firm works on contracts ranging from \$20,000 to upwards of \$90 million. [#I-75a, #I-75b]

- Some other business owners of professional services firms reported professional fees ranging from a low of \$2,000 to a high of \$1 million. [e.g., #I-34, #I-36, #I-60, #I-72]
- When interviewed about contract sizes, a Hispanic American female representative of a minority representation industry association reported that a typical contract with the state is up to about a \$500,000 for a small business. [#TO-03]

Many interviewees discussed factors that determine the sizes of projects or contracts that their firm and others in the industry perform. [e.g., #I-20, #I-22, #I-23, #I-25, #I-26, #I-35, #I-38, #I-48, #TO-07] Determining factors reported include cash flow, bonding capacity, workforce, profit margin and other considerations. Comments follow:

- The African American owner of a DBE, SDVOSB (and other certifications) construction-related firm explained that he prefers contracts in the \$10,000 range, and said, “It has to do with cash flow When you get to a larger dollar amount, you’re going to have more requirements.” [#I-09]
- A white owner of a construction-related firm reported that the size of contracts is limited by the firm’s finances and bonding capacity. He added that the firm can bond up to \$2 million. [#I-27]
- “One of the things we learned in the last few years is that many of the projects, even when they break the project up into smaller pieces, the requirements for those small pieces are more than a small business can handle. It is very difficult for a small business to do a \$1 million bond for a project,” reported an African American female representative of a minority chamber. [#TO-04]

The same chamber representative also commented that the association has been trying to encourage big contractors to break the contracts up into smaller pieces that are manageable for a business that does not have a \$1 million revenue stream. [#TO-04]

She later remarked, “Very few of our membership are able to deal with a \$500,000 contract A \$100,000 contract is huge for a small business.” [#TO-04]

- An African American female representative of a minority industry association used the example of the City of Denver by commenting, “Denver is not going to give a very large contract to a small company until they prove their work The ones that get the big projects ... do all sorts of work.” [#TO-02]

- One female representative of a minority business organization reported, “[We] try to create smaller ones [contracts].” She explained that DBEs and other small businesses cannot handle entire projects, but still need the exposure to well-known primes to get their names out there. [#TO-05a]
- A Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported that although the firm’s biggest project as a prime was \$11 million, she prefers contracts under \$10 million. She explained, “We can perform it easier ... I don’t have the workforce [for larger]” [#I-14]
- Reporting on types and sizes of contracts, the white male representative of a former WBE professional services firm reported, “It’s our ability to effectively staff that project for the duration ... it’s really staffing and our parallel workload that is a determinant of our [work capacity] ceiling.” He also added that the firm considers whether it has appropriate insurance coverage for each project. [#I-65]
- When interviewed, the white male owner of a professional services firm commented, “We need to make sure we make enough money to make it worthwhile [to prime]” [#I-41]
- Performing as a subcontractor, the Hispanic American female owner of a DBE/MWBE/SBE construction-related firm reported that contract size is largely determined by the general contractor and the type of work required. [#I-40]
- The white female owner of a professional services firm indicated that the size of a given project is “completely dependent on [the agency’s] goals and their budget.” She reported that her firm has performed contracts as small as \$2,500 annually up to \$850,000 to \$1 million per year. [#I-57]
- The white female owner of a WBE/DBE/SBE/EBE professional services firm reported that sizes vary. She remarked that she will accept whatever contract size is available, but if she is busy enough, she turns down the small “squirrely” ones. [#I-71]
- “Our approach has always been more client driven. We like the relationships ... so it really depends on the market sector where the [contract size] sweet spot is,” commented a white female representative of a construction-related firm. [#I-39]
- The white owner of a professional services firm commented that the firm is normally involved in smaller contracts (\$5,000 to \$20,000). He stated that his rate, his availability and how many hours he is willing to work are factors that determine the contract sizes his firm will perform. He commented, “I really don’t like to work 40-hour weeks anymore ... but there are going to be times, especially if I end up going on site, when there will be a two- or three-week period where I might be ... working 12 hours a day for six or seven days a week.” [#I-42]

Geographic scope and any changes over time. Business owners and representatives reported where they conducted business and if over time, they had expanded the geographic locations where they perform work.

Most business owners interviewed reported to work primarily in Colorado. [e.g., #I-01, #I-17, #I-33, #I-37, #I-39, #I-42, #I-44, #I-49, #I-50, #I-51, #I-52, #I-55, #I-68, #I-71, #I-72, #I-75a, #TO-09a, #TO-12] Examples include:

- The Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that he works primarily in Colorado with CDOT and other public entities. [#I-03]
- Regarding geographic scope, an African American male owner of a DBE, SDVOSB construction-related firm reported that his firm frequently performs work in the City of Denver. He added that he has conducted work on a project for I-70 which spans the length of Colorado. [#I-09]
- “We’re middle of the road We want [targets] to be in the State of Colorado,” commented a white female part owner of a WBE services firm. She added that she prefers when a customer’s corporate office is in Denver, however. [#I-24]
- “A lot of it is determined by historical geographies, it’s about who’s willing to go to do the work ... there’s some traditional geography that has been in place for years,” remarked the white owner of a services firm. He added, “Me being a smaller company than the other distributors in Colorado, I’m a little more nimble and able to make a profit in rural areas.” [#I-37]
- The white male owner of a construction-related firm reported that his firm’s central region of business is in the City of Denver and El Paso County. [#I-27]

Some businesses reported to combine working in Colorado with an expansion to other states. [e.g., #I-54, #I-60] For example, a Hispanic American owner of a professional services firm reported that he primarily works in the Fort Collins, Colorado area but he is currently expanding into Nevada and California. [#I-73] The white male owner of a professional services firm reported interest in expanding to other western states and more state agencies. [#I-31]

Public or private sector, or both, and preferences/experiences in each. Business owners and representatives of trade associations discussed whether their firm or the firms they represent conduct work in public sector, private sector or in both arenas.

The white male representative of a chamber of commerce reported that many Colorado businesses conduct both public and private sector work. While the association encourages businesses to consider a wide range of opportunities, he concluded that once businesses start securing more opportunities in one sector than in the other, they typically begin to concentrate in the most lucrative of those arenas. [#TO-01]

A wide range of business owners and representatives interviewed confirmed work in both sectors. [e.g., #I-02, #I-04, #I-08, #I-10, #I-15, #I-27, #I-28, #I-29, #I-34, #I-35, #I-36, #I-39, #I-40, #I-41, #I-42, #I-44, #I-46, #I-43, #I-51, #I-52, #I-54, #I-57, #I-59, #I-60, #I-63, #I-65, #I-75a, #I-76, #I-78, #TO-03, #TO-04, #TO-05a, #TO-07, #TO-09a] For example:

- An Asian American male owner an MBE/DBE professional services firm reported work in both public and private sectors. Another professional services firm owner stated, “We have worked for many municipalities and then homeowners and business owners alike.” [#I-06, #I-16]
- Reporting on working in the public or private sector, the African American part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that the firm performs work in both sectors, as well as performs work on federal projects. Another African American male owner of a (and other construction-related firm (DBE, SDVOSB) also reported to conduct work in both sectors. [#I-18, #I-09]

The white female representative of a construction-related firm reported work in both sectors including work with State of Colorado, CDOT, the community colleges and several municipalities and counties. [#I-39]

Many interviewees reported to have worked on some public sector contracts or subcontracts including some with state agencies in Colorado. [e.g., #I-13, #I-18, #I-19, #I-33, #I-34, #I-35, #I-39, #I-41, #I-46, #I-52, #I-54, #I-72, #I-80, #TO-05a, #TO-05b, #TO-09a]

Some business owners and representatives reported primarily public sector work. [e.g., #I-03, #I-61, #I-66] For example, the white male representative of an industry association reported that the firms represented work mostly in the public sector. [#TO-06]

- A Native American owner of a DBE construction-related firm reported that most of the firm’s work is in the public sector. He indicated that any private sector work performed is commercial. [#I-07]
- The white female owner of a DBE/ESB/WOSB construction-related firm reported that 90 percent of the firm’s contracts are either state or federal with most of the work with Forest Service, Bureau of Land Management (BLM), Park Service, National Parks, and some CDOT work. (She added that the more lucrative contracts are on the federal side.) [#I-21]
- An Asian American owner of an ESB/DBE construction-related firm reported that the firm works mostly in the public sector. He commented, “Most of our work is with CDOT, but I have a lot of contacts with cities as well that we’d like to eventually venture into” [#I-12]

One business owner reported that over time her business transitioned from performing exclusively private sector work to exclusively public sector contracts. The white female owner of an Asian American-owned DBE professional services firm reported that the firm used to solely perform private sector work but transitioned to exclusively public sector work as she built personal connections with primes (conducting public sector contracts) over the years. [#I-50]

Another business added nonprofits to its mostly public sector portfolio. The white female owner of a professional services firm reported to primarily work with government agencies and nonprofits. [#I-72]

Some business owners and representatives reported on why they prefer public sector work.

These businesses emphasized prompt payment, minimization of risk, expectation for quality work at the best price and consistency as reasons they preferred public sector work, for example:

- A white female representative of a certified (WBE, DBE) professional services firm noted that she prefers public sector work, and commented, “I am more confident that they are going to pay me.” [#I-02]
- The Asian American owner an MBE/DBE professional services firm reported that private sector work “is much riskier.” He added that when the Great Recession hit, “it was like walking off a cliff, because all ... private [sector] clients just vanished.” [#I-06]
- An Asian American owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that he prefers public sector work because he “knows the clients” and is familiar with the work. Another reason, he added, is because public sector work is focused on getting the best work done at the lowest price. He went on to report that some private sector clients can be difficult. [#I-03]
- The white female representative of a construction-related firm reported that one advantage of public sector work is that it is “consistent” work. She added, however, that public sector work can sometimes be slow. [#I-39]

One business owner, referencing CDOT opportunities for example, indicated that she prefers public sector work when there are DBE participation goals. A Hispanic American female owner of a DBE/MWBE/SBE construction-related firm reported that when considering bidding opportunities with CDOT, she first examines the DBE participation goals for the project. [#I-40]

The same business owner explained, “If there is [a DBE] participation [goal], there’s more of a chance of the contractor using us to [fulfill] the participation [requirement].” [#I-40]

A few business owners discussed the disadvantages of working primarily in the public sector.

The Asian American owner of an ESB/DBE construction-related firm that works primarily on government contracts in Colorado indicated that staffing limitations can be a barrier to securing and successfully performing multiple public sector jobs simultaneously. [#I-12]

A Hispanic owner of a formerly certified SDV construction-related firm said that regarding public sector work, “some firms decide to bid on things for close to nothing.” He continued, “They are doing this work for free pretty much ... just [because] they know once they get into the project, they can charge whatever they want [in change orders].” [#I-30]

Other interviewees reported Colorado work mainly in the private sector. A number of business owners and representatives reported work primarily in the private sector. [e.g., #I-01, #I-08, #I-13, #I-23, #I-30, #I-31, #I-32, #I-38, #I-47, #I-49, #I-56, #I-58, #I-62, #I-71, #I-73, #I-74, #I-79, #I-80, #TO-08, #TO-10] Examples follow:

- The white female owner of a WBE professional services firm reported that her firm works in both the public and private sector, although most of the work is done for private firms. [#I-01]
- The white female part owner of a professional services firm reported that it was a strategic decision to not go after public work to avoid competing with the primes she has relationships within the private sector. [#I-22]
- Regarding working in the public or private sector, the white part owner of a services firm reported that in Colorado, the firm only performs private sector work. He reported public sector work in North and South Dakota. [#I-37]
- After pursuing work in the public sector with little success, the white part owner of a WBE professional services firm reported to work almost exclusively in the private sector although he went on to say that he has prior experience working in government and has clearance to work with certain government agencies. [#I-25]

A few private sector-focused businesses reported a desire to build the “resume” and capacity to compete for public sector work. [e.g., #I-38] Comments follow:

- An African American female representative of a minority representation industry association stated that “a lot of ... smaller companies would like to get more public work ...” She explained that many that are successful in the private sector, are limited to subcontract roles in the public sector “due to them not having a ton of experience or money.” [#TO-02]
- An Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm reported that while the business only works in the private sector, they are “trying to build [their] resume to be able to be competitive in the public sector.” [#I-20]

- “I think success is when I have my first government project that I’ve successfully bid, won, executed and made money on,” commented an Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm. [#I-20]
- The white female part owner of a professional services firm reported that it was a strategic decision to not go after public work because she did not want to compete with the primes she has built a relationship within the private sector. However, given the right opportunity to bid with the State of Colorado she would reconsider, “If there was a way for me to work with these different entities directly through the bidding system, I would certainly like to learn how to do that.” [#I-22]
- “We are trying to get into public, but that is a steep hill to climb ...” remarked an owner of a DBE professional services firm. He added, “You’re putting out \$120,000 in labor without guaranteed money back, and for a small business [that is high risk] [The State of Colorado should have] ‘some sort of a fee structure’ for projects.” [#I-32]

Some business owners and representatives explained why they prefer private sector work. Some noted disadvantages to pursuing or working in the public sector. [e.g., #I-57, #I-60] Some of these businesses experienced greater return on investment, direct outreach from clients and less paperwork while working in the private sector. For example:

- A white female owner of a WBE professional services firm reported that pursuing public sector work can sometimes be time consuming and bear little reward due to the high level of competition for those contracts. [#I-01]
- Reporting on why he prefers private sector work, an African American part owner of a DBE/MBE/WBE construction-related firm reported that he has received much more work in the private sector than the public sector. He commented that this is because of the private sector’s hands-on approach to DBE outreach, and commented, “The private sectors are the ones that are going out to the small business owner, the ones that will give us the time to sit and talk with them about what’s going on in their lives.” [#I-08]

The same business owner added that partial upfront payment is standard in the private sector, making securing work much easier for small businesses. He noted that such a practice is not available in public sector jobs, and that small businesses are expected to supply bonds for public works projects and carry material costs. [#I-08]

- The private sector is a “a little easier to work with” because they do not require a lot of paperwork, remarked a white female owner of a professional services firm. [#I-54]
- When interviewed, a white female owner of a WBE/DBE/SBE/EBE professional services firm reported that a disadvantage to public sector work is “paper-heavy proposals,” and commented, “All [that paperwork], just to do little jobs.” She added that if you miss one thing, “the whole thing gets tossed.” [#I-71]

- The African American owner of a DBE, SDVOSB construction-related firm commented that while he used to prefer public sector work, he now leans more toward private due to the “bureaucratic” requirements of public sector work. [#I-09]

He explained, “The biggest difference between the two is the administrative aspects of it. The paperwork for public is a definite must, depending on what you’re doing ... especially if you’re doing work as a [general contractor].” [#I-09]

- Regarding working in the private sector, a Hispanic American owner of a construction-related firm reported that private sector contracts tend to have more lenient requirements and higher pay. He added, “When you bid for certain contracts for the State of Colorado, they need a whole crew.” [#I-56]

One business owner reported a more level playing field in the private sector. A Hispanic American female owner of a DBE/MWBE/SBE construction-related firm experienced “more of an even playing field [in the private sector] than in the public sector.” [#I-40]

Prime or subcontractor/subconsultant. The study team asked business owners and representatives whether they worked as a prime or subcontractor/subconsultant. [e.g., #I-10, #I-12, #I-20]

Some business owners reported that minority- and women-owned businesses and other HUBs are often limited to a subcontractor role. For example, an Asian American owner an ESB/DBE construction-related firm commented, “... we are ‘pigeonholed as subconsultants’ ... it’s hard for a public entity like CDOT to put us as a prime for anything” [#I-12]

A white male representative of an industry association reported that some firms are almost always subcontractors because they perform specialty contracting work. Another representative of an industry association commented, “... some of the members who are in the trades ... are members that will be the subcontractor in those roles” [#TO-06, TO-10]

Only a few business owners reported primarily working as prime contractors. For example:

- Reporting on working as a prime or a sub, a white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm remarked that she does not “do subcontracts” and that she only performs as a prime contractor. [#I-21]
- A white female owner of a WBE professional services firm reported that she prefers to not be a subconsultant because she likes having autonomy over her work process. However, she added that if the relationship with a prime was more of a partnership, she may be willing to reconsider being a subconsultant. [#I-01]
- The white male representative of an industry association commented, “The big production guys, even really down to the custom guys, are pretty much their own GCs ... they will sub out a lot of the work, dry wall crew, framing crew, roofing crew and so forth, and some of them have all of that in house” [#TO-10]

Some reported that largely based on opportunity and scope of work, their firms work as both primes and subs. [e.g., #I-06, #I-26, #I-36, #I-39, #I-52, #I-60, #I-75a, #I-77, #I-78, #TO-09a]

- A white male representative of an industry association reported that almost all firms that typically work as a prime also work as a sub at some point. [#TO-06]
- The Asian American owner of a certified (DBE, SBE, ESB, MBE) professional services firm reported that he looks for projects where he thinks he can do a good job as a prime if he has staff to perform the work. He added that if he does not, he will look at being a sub and work on a smaller part of the project. [#I-03]

Current conditions for firms in the Colorado marketplace. Business owners and representatives reported on the Colorado marketplace.

Many reported unfavorable economic conditions in the local marketplace. [e.g., #AS-23, #AS-33, #AS-44, #AS-83, #AS-84, #AS-85, #AS-90, #AS-91, #AS-92, #AS-93, #AS-94, #AS-95, #AS-96, #AS-97, #AS-98, #AS-99, #AS-100, #AS-101, #AS-102, #AS-103, #AS-104, #AS-105, #AS-106, #AS-107, #AS-108, #AS-110, #AS-111, #AS-112, #AS-115, #AS-116, #AS-117, #AS-118, #AS-130, #AS-131, #AS-191, #AS-192, #AS-256, #AS-257, #AS-264, #AS-264, #AS-265, #AS-266, #AS-267, #AS-268, #AS-270, #AS-271, #AS-392, #AS-393, #AS-394, #AS-395, #AS-474, #AS-475, #AS-476, #AS-477, #AS-478, #AS-479, #AS-500, #AS-507, #AS-556, #AS-623, #AS-643, #AS-644, #AS-670, #AS-676, #AS-679, #AS-684, #AS-715, #I-03, #I-41, #I-38 #I-44, #I-45, #I-46, #I-48, #I-50, #I-51, #I-52, #I-57]

For example, one white female owner of a certified professional services firm remarked, “As economies change ... [work] can almost come to a screeching halt.” She added that the general unpredictability of the market in Colorado is particularly challenging for HUBs. Another professional services business owner indicated that today’s uncertain economy also presents a barrier to entry into the industries. [#I-71, #I-42]

Many business owners reported that the “uncertainty” of COVID-19 has impacted the environment for small businesses in Colorado. [e.g., #AS-121, #I-33, #I-80] A white female owner of a professional services firm added that “the uncertainty is challenging.” “Everything to do with COVID-19 has drastically destroyed our industry right now,” reported another business owner. [#I-72, #AS-138]

A representative of a minority business organization declared that small businesses are not getting current opportunities to grow, “They are either not getting work at all or go broke doing it.” [#TO-05b]

An African American female partial owner of a professional services firm reported, “... with COVID-19 ... our company has gone stagnant at the moment At the beginning of the year we were ‘cruising’ with the opportunities that were coming in.” [#I-51]

Many minority- and women-owned businesses and other small business owners reported difficulty keeping their businesses afloat during COVID-19. [e.g., #I-18, #I-24, #I-26, #I-35, #I-36, #I-37, #I-39, #I-42, #I-43, #I-48, #I-49, #I-56, #I-65, #I-67, #I-78, #TO-02a, #TO-03, #TO-04, #TO-11, #TO-12]

A few commented on the effects of “COVID-19 stay-at-home” orders, while others reported cancellations or postponements of contracts, supply chain limitations and other challenges. For example, a woman business owner said, “It has totally wiped us out!” [#I-28] Comments follow:

- Regarding the current economic conditions in Colorado, a white male president of a professional services firm reported that COVID-19 has been “pretty severely dampening.” [#I-13]
- When surveyed, a white female owner of a professional services-related firm reported, “Stay-at-home-order is preventing us from expanding our business.” [#AS-109]

An Asian American owner of a services business, when surveyed commented that the pandemic is creating barriers, “COVID-19 ... [I’m] unable to work.” [#AS-549]

- A white female owner of a WBE professional services firm stated, “... my business has gone from looking very robust in [early] 2020 to literally almost nothing in the scope of a few weeks. More concerning to me is looking forward.” [#I-01]

An owner of a construction-related firm and member of the LGBT community reported, “The current conditions have definitely contributed to the demise of some projects, we’ve had three projects canceled and four projects postponed.” [#I-79]

One female president of a DBE professional services firm reported that although the COVID-19 pandemic has not affected the firm in the immediate short term, “looking down the road” she expects to see “proposals being cancelled ... projects being cancelled.” [#I-11]

- With regards to government and health care contracts, the female owner of a consulting firm reported that since COVID-19, “all of those contracts have been completely dropped [or] put on hold.” She commented, “It’s been tough we’ve just been hanging on by a thread. We’ve had to be very strategic.” [#FG-04c]
- A white owner of a goods business commented on the “uncertainty in the economy compounded by COVID.” He reported, “There’s barriers to being able to compete.” He explained that supply chain and shipping limitations from China are detrimental to the economy, as well. [#AS-566]
- “When COVID initially hit, we saw an immediate change in our sales pipeline, a chunk of which is nonprofits ... because we had some longer term contracts, those held us over until June ... but now there’s less work available ... we are just now starting to feel that stress because our business development pipeline has been dry now,” remarked a white female owner of a professional services firm. [#I-72]

- When asked about the marketplace, an Asian American male owner of an ESB/DBE construction-related firm reported, “I’m concerned ... most of the money that comes for construction projects comes from the gas tax and no one’s driving right now.” [#I-12]
- Reporting on current marketplace conditions, the African American owner of a specialty services firm indicated that marketplace conditions are especially challenging now for firms that have not built business relationships. He commented, “In regard to my business, I’ve been very fortunate because I’m a very big relationship builder” He added that as we move forward from the COVID-19 pandemic, a lot of minority firms that have not focused on relationship building will be “affected tremendously.” [#FG-04a]
- Commenting on current marketplace conditions in Colorado, one representative of a state agency reported that many State of Colorado projects are coming to an end, and that there is concern among contractors regarding budget balancing and, specifically, “CDOT’s budget being reduced.” [#FG-01f]

CDOT, she explained, is generating much less revenue via gas tax because less people are driving. She said, “Contractors ... [were] all busy and things were going on, and now all of a sudden it feels like it’s going to come to a screeching halt.” [#FG-01f]

The same representative continued, “It ... challenges ... women- and minority-owned firms [that] ... just don’t have the same resources.” She commented that they “don’t have ... big backlogs, or cash sitting around.” She added, “It’s ... harder for small businesses [now].” [#FG-01f]

A number of HUBs and representatives reported growing competition in the Colorado marketplace from larger, more established firms, or tightening of pricing, profit margins and other resources (similar to the effects of the Great Recession). A Hispanic male owner of a former SDV construction-related firm explained, “It is competitive right now.” [#I-30] Examples follow:

- Economic conditions were good prior to Covid-19 reported a Native American owner of a DBE construction-related firm. He commented, “Since then, we have been able to secure ‘one’ more contract We are all concerned ... with not a lot of work coming out through the pandemic that pricing is going to be super aggressive after the pandemic is over.” [#I-07]
- An Asian American owner an MBE/DBE professional services firm reported that prior to COVID-19, large firms went after big-budget projects; now, it is a struggle as there is increased competition from big businesses competing in the marketplace for contracts under \$5 million (his firm’s “sweet spot”). [#I-06]

He observed that junior architects at lower salaries are now employed by larger firms to “tee up” to go after smaller projects. He noted that he is currently competing against three “huge” Denver firms that normally focus on larger projects, as an example. [#I-06]

- The representative of a state program also observed increased competition in the marketplace, “We’re getting more contractors bidding ... needing work.” [#FG-01c]
- An Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm reported, “In the private sector, it is a very difficult spot for a small, not very established company I can’t compete with [larger, established firms], but they can swoop in and go after these projects that they usually would not be interested in before but now they might be because they’re projects are drying up.

This business owner summed up her observation of how small, less-established businesses are disadvantaged, “[Large firms are] able to go small and I can’t go big.” [#I-20]

- The African American male part owner of a DBE/MBE/WBE construction-related firm reported that the business’s gross income has increased but profits have not. He commented, “We have been able to make a little money, but we haven’t been able to save any money.” When asked about how COVID has impacted his business, he added that all communication for business has come to a halt. [#I-08]

An African American male part owner of a DBE/MBE/WBE construction-related firm reported that the business had been growing prior to the pandemic and has not been able to save money. [#I-08]

- A white male owner of an ESB professional services firm reported that before the pandemic, the local market was “very robust.” He stated that he foresees his firm having to adapt to delayed effects from the shutdown and changes in behavior due to COVID-19. [#I-34]

He explained, “On the public side, a lot of the local agency budgets are going to be challenged by the loss of sales tax revenues. We probably will see a ... dip in public work next year.” [#I-34]

A few reported how the current economic downturn affects staffing, workforce development and billable hours, for businesses in Colorado. For example:

- Regarding the current marketplace conditions in Colorado, a white part owner of a professional services firm reported, “Right now we are very busy because we’ve had a backlog of work from January when everyone had a full budget.” He commented, “The State of Colorado canceled all the training classes and testing ... so I can’t have anyone hired and trained who are unemployed ... there is more demand than supply right now.” [#I-29]
- A representative of a state program said that due to the ongoing COVID-19 pandemic, small contractors have made layoffs and are struggling to hire and rehire people. She commented, “Sometimes [workers] were making more on unemployment than they were [when] working, and so [the] rehiring process ... has become challenging for a lot of these folks.” [#FG-01f]

- “I’ve since released two employees ... nobody [is] paying during the pandemic,” commented a white male owner of a DBE professional services firm. [#I-32]
- One professional services business owner reported waiting for his own unemployment stating that the pandemic reduced his billable hours by 50 percent. [#I-23]

A few interviewees reported ways businesses are coping with the current economic downturn. Some reported laying off workers, applying for SBA Paycheck Protection Program (PPP) loans, reducing office space, closing up shop or taking other steps, for example:

- A white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported that she started looking to private sector work, since people are at home and there is a need for it. [#I-21]
- Reporting working in an “essential industry,” a white female part owner of a professional services firm reported that her work has dropped by 80 percent. She added that in April and May she experienced downturn and does not know what will happen next. She noted that the “PPP is helpful,” but the firm is “hanging on by a string.” [#I-22]
- A Hispanic American owner of a professional services firm reported that the COVID-19 pandemic caused a significant disruption to investments and investors. “Right when COVID hit, [investors] pulled all of their funding. I had to scramble to line up other investors.” He also explained that he was forced to close office space, halt a youth entrepreneurship program while general revenue opportunities became limited. [#I-73]
- One representative of a minority-owned professional services firm commented, “It’s affected our business in a positive way, unfortunately. I mean, of course I don’t want to be profiting from that, but there is just no way to stop it.” He explained, “We’ve had to model our whole organization based on ... working from a virtual marketplace. So, distribution, corporate offices, installation, warehouses, all of that has been scrubbed We still offer the same services and equipment ... but we’re spreading out the business based on the manufacturer and we have gone to more of a sales organization with the ability to hire [many more staff]. We’ve had to massage our operations ... to streamline what we can do based in this environment.” [#I-75c]
- One female representative of a state agency commented that the smaller colleges in her area are especially important to the community. She explained, “In some cases, they are the center of the economy in those towns They really make an effort to support local business in their communities.” She said that despite the COVID-19 pandemic, small local businesses are still getting business from the local colleges. [#FG-03a]

- A white male part owner of a services firm “diversified more and more” to stay afloat. On the other hand, a part owner of a WBE construction firm indicated that not meeting the growth expected, he and his wife “are looking at another opportunity.” [#I-37, #I-16]

The representative of a state program reported, “We have subcontractors that will close up shop because they have an outbreak [of COVID-19] It’s a tough time for people to make money when they need to make money.” [FG-01c]

Focus group participants, most representing public agencies, discussed current economic conditions in the Colorado marketplace. Most indicated a downturn in available work or uncertainty surrounding future work due to the COVID-19 pandemic. Comments include:

- A representative of a state agency reported that they took some action to “balance out” a downturn in A&E-related bids since the pandemic, and commented, “I’ve definitely seen a decrease in our project-specific projects ... now.” [#FG-02a]

The same agency representative noted, however, that there’s “no danger” in terms of their non-project-specific or on-call A&E work being solicited. She went on to comment, “There’s a lot of hesitancy that we’re experiencing right now.” [#FG-02a]

- “In general, it seems like the construction market has a lot of capacity to do work and submit bids right now. There are certain concerns about accessing state facilities like our prison facilities, and potential concerns about COVID transmission,” remarked a representative of a state agency. He added, “I don’t see a lot of change from our normal business even a year ago.” [#FG-01b]

The same agency representative continued, “What we suffer from most is getting bid solicitations out in a format where I’m getting [adequate] responses” He reported that while they have good distribution and get reasonable bids, they would still like “more competition.” He commented, “It’s more of an outreach and accessibility issue for us, than anything.” [#FG-01b]

- The representative of an engineering-related trade association reported that right now most A&E firms are “busy finishing” pre-pandemic work but there is “a big concern,” especially for horizontal A&E work, about what may happen in the fourth quarter of 2020 and the first half of next year. She stated, “Local agencies’ budgets ... some of them are already stopping or slowing down those kinds of projects.” [#FG-04b]

She stated that on the vertical side, “there was a stop, initially,” in a lot of private work due to the pandemic but it has “picked up” since mid-March. She noted, however, that there is “not so much” work in areas like commercial hospitality or office space. She added that ventilation and air quality are areas that saw an increase in work. She went on to say, “They’re telling me on the vertical side [that] they’re seeing more RFPs than they have before.” She noted, however, “How many will continue to pan out is a different story There’s still a lot of uncertainty overall.” [#FG-04b]

- The representative of a public entity noted that a lot of small businesses in Colorado are “quite busy right now.” He added, however, that there is still concern about how things will look six to nine months out. He commented, “All businesses need to have a business development ... sales funnel.” [#FG-01a]

This representative went on to say that this is a concern and that the mentors in CDOT’s mentor-protégé program have been discussing how to do business development if future work is not certain. [#FG-01a]

A small number of business owners reported experiencing limited impact from the pandemic; some reported prospering under the current conditions. Some of these businesses reported experience working remotely or that the industry they worked in was deemed “essential.” [e.g., #I-04, #I-09, #I-25, #I-27, #I-49, #I-61]

Keys to business success. The study team asked interviewees to describe factors that contribute to their and others’ business success.

Most businessowners and representatives interviewed reported that access to capital, financing, credit, bonding and low-cost insurance are critical to business success. These topics are discussed in detail earlier content in this appendix. Other topics also emerged that follow.

Many business owners and representatives agreed that success was achieved through networking, relationship building and securing repeat customers. [e.g., #I-01, #I-02, #I-03, #I-06, #I-21, #I-24, #I-27, #I-28, #I-29, #I-32, #I-33, #I-37, #I-39, #I-40, #I-41, #I-42, #I-43, #I-45, #I-46, #I-49, #I-50, #I-52, #I-54, #I-57, #I-59, #I-60, #I-62, #I-65, #I-72, #I-73, #I-74, #I-78, #I-80 #FG-01f, #TO-01, #TO-03, #TO-04] For example:

- A white female owner of a professional services firm reported that relationships with customers and a stable client base are essential to business success. She added that good communication, good work ethic, continuing education and caring about the quality of work are also keys to business success. [#I-04]
- A white male owner of an ESB professional services firm reported that relationships with CDOT and agency decisionmakers are vital for winning projects. [#I-34]
- Regarding the importance of relationships, the representative of a public entity reported, “[The] networking piece is so important. Building those relationships not just with the government entities, but with the larger prime companies.” [#FG-04d]

Another focus group participant, the representative of an engineering-related trade association, reported that relationship building is a key factor to small business success. She commented, “Whether it is [with] the agencies or the clients ... the political decision makers ... relationship building [is important].” [#FG-04b]

- A male representative of a minority advocacy organization explained, “A lot of it is about ‘who you know.’” [#TO-11]

Many interviewees reported keys to business success as quality work, reputation, good customer service and longevity in the industry. [e.g., #TO-06, #I-11, #I-12, #I-21, #I-25, #I-27, #I-32, #I-35, #I-36, #I-44, #I-77] “Doing excellent work is the secret to success that ‘everybody’ knows, but not ‘many people’ know,” reported the Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm. [#I-03]

“[Help] people experience your work ethic over a period of time, so they have confidence in you,” commented an African American male part owner of a certified (ESB, MWBE, DBE). [#I-18]

A good portion of interviewees reported on recruiting, hiring and retaining good staff as a factor in business success. Most agreed on the importance of good hiring practices and retaining skilled and “loyal” employees. [e.g., #I-08, #I-12, #I-13, #I-18, #I-22, #I-24, #I-33, #I-35, #I-37, #I-38, #I-39, #I-40, #I-41, #I-48, #I-50, #I-63, #I-67, #I-75a, #FG-01c, #TO-03]

For example, a white female representative of a certified (WBE, DBE) professional services firm reported that hiring more employees fell into her broader view of success. [#I-02] Other comments include:

- When interviewed, an Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that there are greater challenges for small businesses seeking talent when compared to larger firms. He added that for him to attract good, young talent he offers opportunities for flexibility, for learning and for working with senior level people. [#I-03]
- An Asian American owner an MBE/DBE professional services firm reported that the firm must stay profitable to be able to pay employees the prevailing rate, “to keep their families whole and having something to distribute at the end of the year.” He added that although he has not been able to make those distributions in the past couple of years, and commented, “We’ve got some very ‘loyal’ employees.” [#I-06]

Many business owners and representatives reported facing challenges finding and retaining qualified staff. [e.g., #AS-06, #AS-34, #AS-36, #AS-38, #AS-39, #AS-65, #AS-134, #AS-135, #AS-136, #AS-154, #AS-155, #AS-156, #AS-157, #AS-158, #AS-159, #AS-160, #AS-161, #AS-162, #AS-163, #AS-164, #AS-165, #AS-166, #AS-167, #AS-168, #AS-169, #AS-170, #AS-184, #AS-190, #AS-197, #AS-207, #AS-208, #AS-209, #AS-210, #AS-211, #AS-212, #AS-239, #AS-246, #AS-258, #AS-274, #AS-274, #AS-275, #AS-276, #AS-283, #AS-284, #AS-285, #AS-287, #AS-289, #AS-363, #AS-367, #AS-368, #AS-378, #AS-406, #AS-407, #AS-408, #AS-409, #AS-410, #AS-422, #AS-450, #AS-490, #AS-491, #AS-494, #AS-504, #AS-520, #AS-526, #AS-528, #AS-532, #AS-541, #AS-561, #AS-563, #AS-564, #AS-577, #AS-588, #AS-607, #AS-639, #AS-649, #AS-666, #AS-674, #AS-677, #AS-691, #AS-699, #AS-713, #I-14] Examples follow:

- “Lack of employees is a barrier because a lot of young people lack life experience, so they require a lot of training,” remarked a white male owner of a DBE professional services firm. [#I-32]

- A Native American male owner of a DBE construction-related firm reported that depending on where the job is located, finding and hiring employees can be difficult. [#I-07]

A white female representative of a construction-related firm reported, “It has become more difficult to hire employees ... many people don’t have valid driver’s license ... it’s hard to get people to come to work [in some areas].” [#I-26]

- One Native American representative of a minority-owned other services firm reported that “finding good people” is challenging. [#AS-155]

The Hispanic American male owner of a construction-related firm remarked that “unqualified people saying they are qualified and a shortage of qualified people” causes challenges for his firm. [#AS-532]

- When discussing the keys to business success, an African American male owner of a DBE, SDVOSB construction-related firm commented, “One of my best workers was an undocumented worker. I didn’t know it when I first hired him, and he was one of my best workers. [With current immigration restrictions] we have a labor shortage of good workers.” [#I-09]

Some interviewees reported on how project labor agreements/unions impact a firm’s success either positively or negatively. [e.g., #I-43, #I-54, #TO-09a] Comments include:

- A white male owner of a construction-related firm reported that union houses have a market advantage when prevailing wages are required. [#I-27]
- A white female representative of an industry association reported that in the absence of unions frontline workers can find it difficult to communicate with business owners who employ them, “If it’s not a union contract, there has to be some mechanism for frontline workers to be able to get information to decision-makers, and companies that are actually successful are ones that solicit and apply that feedback from their frontline workers to their business, whether it’s through a union contract or otherwise.” [#TO-08]
- A white female owner of a professional services firm reported, “What is typically always true is that, while I love unions ... whatever their intent was when they formed the union, it gets lost with the end user ... if I am the end user, I feel like there is almost never a time where working with a union ends up being easy. It’s always an utter pain in the rear end because of all the limitations It always makes my life harder.” [#I-60]

The importance of securing and maintaining equipment and new technologies was important for many businesses including HUBs [e.g., #I-60, #I-75, #TO-02, #TO-03, #TO-09a] Some business owners reported barriers to acquiring the equipment and technologies they need, for example:

- A Native American male owner of a DBE construction-related firm reported, “We don’t have the resources [for equipment] that larger contractors [have].” [#I-07]
- The African American female representative of a minority representation industry association, for example, reported, “[Equipment is] another big barrier where, many times, [small businesses] do not have enough that is required to finish a job.” She added that many of these businesses end up forfeiting projects and sometimes shutting down. [#TO-02]

Several interviewees argued that equipment is accessible if a firm has money to spend, however for some HUBs building the capital to buy equipment is a challenge. [e.g., #I-33, #I-42]

- For example, an African American male owner of an SBE/MBE-certified professional services firm reported, “The access to equipment is there if you have the money.” [#I-43]
- The Native American male owner of a DBE construction-related firm reported, “The major challenge is having the capital to get the equipment.” [#I-07]

A few had not faced any major issues accessing needed equipment. [e.g., #I-34, #TO-08] One, for example, reported using auctions to acquire affordable equipment, when necessary. An African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm stated, “I have purchased equipment over a period of time ... as we grow, I look and see the need and I would go to an auction.” [#I-18]

Some interviewees reported that access to favorable pricing and credit for materials and products is a challenge for HUBs and other small businesses with low volume purchasing. [e.g., #I-36, #I-42] Some interviewees noted that small businesses are disadvantaged when they cannot make large-volume purchases to secure the best pricing. [#I-24]

As another example, the white female owner of a WBE services firm reported that low “buying power” is challenging for small businesses, explaining, “You need to be able to buy in higher volumes to sell at lower prices.” She indicated that it can be a struggle to “hold onto customers” when the price you secure is higher than what large competitors’ pay. [#I-24]

Navigating politics and the bureaucracy impacted the success of some business owners. For example, and African American owner of a specialty services firm reported that “business is very political.” He commented, “That’s why it’s very important to join certain associations.” He described this as a “missing piece” that a lot of small business owners do not understand. He went on to say, “For a small amount, you have access to have a voice with lobbyists. It’s really political, and that’s just business.” [#FG-04a]

Another small business owner reported that the “bureaucracy” disadvantages minority- and women-owned businesses or other HUBs, when seeking to secure work with state agencies in Colorado. [#I-34]

This same owner of an ESB professional services firm stated that “the one big barrier to entry ... for ... the [ESBs and] DBEs [is] a small firm getting ‘actual state work,’ CDOT work.” He commented, “It’s really difficult I think CDOT is a barrier to entry [for] ESBs and DBEs. It’s just the nature of the ‘bureaucracy,’ it’s hard to get in there.” [#I-34]

Measures of success. Interviewees reported to measure success business in both tangible and intangible ways. [e.g., #I-01, #I-14, #I-76, #TO-09b]

Some business owners reported to measure success on whether they could pay bills, make payroll and bring home a profit. For example:

- “Success is having enough money in the bank to not have to worry about payroll,” commented a Hispanic American female owner of a DBE/MWBE/SBE construction-related firm. [#I-40]
- When interviewed, a white male owner of a professional services firm reported, “Success would be if I had sufficient work to pay all of my current bills without having to dip into savings” [#I-42]
- A white male representative of an industry association reported, “Well what’s a successful company? It’s someone that’s able to pay their workers and still bring home a profit at the end of the day.” [#TO-10]

Other business owners consider success to be some combination of a healthy customer base, reliable revenue and planned growth. For instance:

- The African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that completing projects and having the ability to grow are keys to business success. [#I-18]
- The African American female partial owner of a professional services firm reported success as having consistent long-term contracts that provide reliable revenue as well as being able to convert one of her subcontractors to an employee. [#I-51]
- “We set financial goals for each year, looking for double digit growth by the end of each year” commented a white female part owner of a WBE services firm. She added, “Holding onto our customer base and growing at the same time,” is always a struggle. [#I-24]
- “For [our industry association] we look at an organization’s ability to grow ... and that they’re growing year over year, because then they have employees, they’re contributing to the economy, they have a voice at the table, they can create systematic change for other women and job opportunities and growth as well,” commented the white female representative of a minority chamber. [#TO-07]

A number of business owners commented on business culture and quality of life as a measure of success. These include:

- “I’m successful when I am helping organizations create a more successful culture because people are happy to come to work and be there,” remarked a white female owner of a WBE professional services firm. [#I-01]
- A Native American male owner of a DBE construction-related firm reported, “For our company in particular, there are two clear indicators of success ... our primary edict is to employ tribal members ... the number of tribal members we can keep employed is always paramount.” [#I-07]
- “I think a piece of it is being in a space where ... when my team is out, they can be safe, they’re not going to be discriminated against, they’re going to be included, they feel safe and really, it’s quality of life The quality of life we have at home, I want my team to experience that same quality of life in their business and if there’s a limiting factor that keeps them from ... expressing themselves and being out, then that is a limitation and that is a barrier,” remarked a male representative of a minority chamber. [#TO-09a]

Some interviewees measured success by staying relevant, “thinking outside the box” and being passionate about the business. Examples follow:

- A Hispanic American female representative of a minority representation industry association reported, “A successful small business is always looking for ... training, learning, seeing what’s out there ... to continue to move up in the ladder in different ways A successful small business thinks out of the box.” [#TO-03]
- The representative of a state program reported that the successful DBEs that she sees regularly are the ones that are very “committed ... passionate.” She added, “They’re the hard hitting, on the streets, at every single meeting [and] outreach event [DBEs] They really put forth that effort.” She went on to say that once DBEs build relationships and get their foot in the door “contractors use them again and again.” [#FG-01f]

C. Working on Projects With the State of Colorado and Other Public Agencies

Business owners and representatives were asked about their experiences regarding opportunities for contracts with State of Colorado agencies. Topics included:

- Experiences with the State of Colorado;
- Challenges for minority- and women-owned businesses and other HUBs seeking opportunities with the State of Colorado and other public agencies;
- Input on contractor-subcontractor relationships;
- Feedback on finding opportunities to bid with the State of Colorado as a prime or a sub; and
- Suggestions for improvements to State of Colorado procurement practices.

Experiences with the State of Colorado. Business owners and representatives discussed whether they had conducted or sought work with the State of Colorado (including each department of the state government except the university systems), as well as any related experiences.

Many interviewees reported experience conducting work with the State of Colorado.

Some of these business owners also reported experience bidding and conducting work for municipalities, counties or other government agencies in Colorado. [e.g., #I-01, #I-02, #I-03, #I-11, #I-12, #I-20, #I-21, #I-29, #I-32, I-41, #I-42, #I-50, #I-77, #TO-04] Some examples follow:

- A white male representative of an industry association reported that most of the firms he represents have worked for the State of Colorado. [#TO-06]
- A white female representative of a certified (WBE, DBE and others) professional services firm reported that she conducted work with the State of Colorado as a subconsultant. [#I-02]

While an Asian American male owner an MBE/DBE professional services firm reported that he has worked with the community colleges, CDOT and other state agencies. [#I-06]

- A number of interviewees reported work with CDOT. For example, a Native American owner of a DBE construction-related firm reported that he has performed a handful of projects for CDOT. He reported that working with state agencies in Colorado such as CDOT and community colleges has been positive although he stated, “We are not able to consistently compete in a low price, no qualification market. [#I-07]

The Asian American male owner of an ESB/DBE construction-related firm reported a subconsulting assignment with CDOT. Another interviewee reported, “We were on an on-call contract with CDOT ... for many years, so we’ve done all kinds of expansions to facilities ... minor renovations, all over the State of Colorado.” [#I-12, #I-39]

- A Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported work with CDOT, Douglas County and the Colorado Springs Airport. She indicated searching CDOT’s website for opportunities. [#I-14]
- One white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported that she only has experience working as a subcontractor on a few CDOT projects and no other state agencies. [#I-21]
- A white female part owner of a professional services firm reported that she worked with Internal Document Solutions (IDS) with the State of Colorado. [#I-22]

- “We do small projects for [Department of Corrections] ... we’ve placed a couple of outdoor toilets in the years past for the forest service,” remarked a white female representative of a construction-related firm. [#I-26]
- While being interviewed, a white owner of a construction-related firm reported that he has performed work for the Department of Public Safety and the Department of Health, and that both departments have been very good to work with. [#I-27]
- Regarding types of public sector entities firms work for, an African American owner of a DBE, SDVOSB construction-related firm reported to have “run the gamut” with public agency work; he listed: CDOT, FEMA, City and County of Denver and the Regional Transportation District (RTD). [#I-09]
- The Asian American owner of a (DBE, SBE, ESB, MBE) professional services firm reported that he has worked for CDOT and the State of Colorado but has not worked with Community Colleges (CCCS). [#I-03]
- When interviewed, a white female owner of a professional services firm reported that she has worked with the State of Colorado and was hired as a prime contractor for small- to medium-sized projects. She added that she has worked with the CDOT and has had positive experiences with that entity. [#I-04]
- “Some entities are easier to work with than others,” reported a Hispanic American female owner of a professional services firm. She has worked with Colorado State Patrol, the Department of Personnel & Administration (Colorado DPA) and a community college, and Department of Military and Veterans Affairs (DMVA). [#I-66]
- A Hispanic American male partial owner of an MBE/SBE/DBE construction-related firm reported that the firm has done work for the State of Colorado but added that “the state is a pretty hard bid, competitive, low-dollar wins.” [#I-67]

Challenges for minority- and women-owned businesses and other HUBs seeking opportunities with the State of Colorado and other public agencies.

Business owners and representatives discussed barriers that unfairly disadvantage minority- or woman-owned businesses or other HUBs in learning about or participating in contracts with the State of Colorado or other public sector agencies. [e.g., #I-05, #I-06, #I-08, #I-09, #I-18, #I-20, #I-21, #I-34, #I-41, #I-60, #I-75a, #I-80]

For example, the representative of a state agency commented that HUBs “sometimes don’t have the resources to bid on the bigger projects.” She explained, “They just don’t have the capability to hire maybe the right experts, so it hinders them ...” She added that submitted proposals by these firms are often “ranked lower” because they don’t have the right qualifications. [#FG-02g]

A number of minority- and women-owned businesses and other HUBS reported difficulty securing work with the State of Colorado and other public agencies because they are not known to or recruited by those agencies or have difficulty finding out about bidding opportunities.

One industry association representative reported that firms in the know often secure repeat work, while others struggle to even learn about the opportunities with the state. Examples follow:

- “It’s that access to the right people, or being affiliated with an organization that does resource navigation ... if you’re just an entrepreneur out there on your own, it’s very hard to find your way into a network that can help you navigate and find opportunities,” remarked a white female representative of an industry association. [#TO-08]
- An African American business owner reported difficulty making the connections in the public sector. Also regarding connections, the Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that the challenge is that “this guy doesn’t know me ... this guy knows that other guy.” [#I-77, #I-03]
- An Asian American female business owner and another HUB reported having trouble finding out about work opportunities with state agencies. [#I-72, #I-01]
- A white female representative of an industry association reported, “[There is an] ‘information silo’ [for HUBS] ... having access to the information to know about the opportunities that are available to your firm.” [#TO-08]
- A white female owner of a WBE professional services firm indicated that minority-owned, women-owned and other disadvantaged businesses usually have a lack of understanding of the bidding and procurement systems that white-male owned firms do not have. She added that this affects their ability to get contracts, particularly with government agencies. [#I-01]
- The white female representative of a minority chamber commented, “We do share mostly city, I don’t get a lot of state updates, I don’t know why we’re not plugged into that network, but the city shares a base with me all the time, and so I share that with a lot of our members, and we’re one of the ways, I don’t know how else they find out.” She added that she does not know why she does not hear more from the state and emphasized that she hears more about city opportunities than state opportunities. [#TO-07]
- Because of the limited access to information about state contracting and consulting opportunities (for minority- and women-owned firms and other HUBS), an African American representative of a minority representation industry association stated, “There is so much work out there, but it always goes to the ‘same people’ I think that is a shame.” [#TO-02]

- A white part owner of a professional services firm indicated that there are not many opportunities for his firm in the public sector. He commented, “Public sector work is already allocated.” [#I-29]

Some minority- and woman-owned and small business owners commented that primes do not include them on their teams when bidding public sector work, or solely work with subs they already know; some reported that the state also relies on “go-to firms” making it difficult to get a foot in the door. For example:

- A white representative of an industry association reported that the association can do matching. He added, “... you don’t see a lot of subcontractors out there.” [#TO-10]
- A part owner of a of a WBE/ESB professional services firm stated, “As a sub, you’re just kind of at the mercy of the primes. You have very little control over whether you win the work or not. You have very little direct control. You can only put your best foot forward, but that foot is just one foot out of many in a larger packaged group.” [#I-36]
- A white female representative of a certified (WBE, DBE) professional services firm. stated, “... there are certain parts of a project that are always a ‘go-to firm’ ... who I know I am competing against for the work.” [#I-02]

Some interviewees reported small size as a barrier to competing for and securing work with state agencies (size barriers often affect HUBs as they are disproportionately small businesses).

A representative of a state agency explained, “There’s an inherent bias through underrepresentation of contractors that can’t make [it through] the state’s qualification process, or [don’t] have the size that shows they can do a larger project.” [#FG-01b] Related comments follow:

- “The State of Colorado makes it difficult for small businesses ... the rules and regulations,” commented the owner of a professional services firm. [#I-47]
- A white female owner of a WBE professional services firm indicated that minority-owned, women-owned and other disadvantaged businesses usually have a lack of understanding of the system that white male-owned firms do not have. She added that this affects their ability to get contracts, particularly with government agencies. [#I-01]
- A female representative of a minority business organization reported, “In terms of being able to access contracts with state agencies ... sometimes people do not have the size for the company to take over a full contract.” She added that their department advocates in the creation of smaller contracts that can be more accessible to smaller businesses to participate. [#TO-05a]
- “We would have to subcontract our workload to other companies a lot in order to fulfill a lot of the work [on contracts with State of Colorado],” remarked an Asian American male owner of an ESB/DBE construction-related firm. [#I-12]

- A white female owner of a professional services firm reported, “As a small start-up business, it can be difficult to go against larger, more established firms.” [#AS-28]

A number of minority- and women-owned firms and other small businesses reported an “onerous” bidding and procurement process. Many business owners and representatives commented that for minority- and women-owned businesses and other small businesses nearly every step in the state bidding and procurement process (from upfront costs to pre-bid to contract award) poses a challenge. The following comments demonstrate those challenges:

- “Paying \$900 for BidNet [is the first challenge],” remarked an owner of a DBE professional services firm. A white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported that no one should have to pay for the construction plans. [#I-32, #I-21]
- Regarding procurement requirements, an African American male owner of an SBE/MBE-certified professional services firm commented, “It is challenging to get approved for RFPs.” [#I-43]
- A white female representative of a construction-related firm reported that attending mandatory pre-proposal meetings can be challenging for a small business when they are not announced well ahead of time. [#I-39]
- “The RFP and RFQ process is so ‘onerous’ that it has to be super aligned with the work that we do for me to even want to go after it ... I don’t ever really want to go after something by myself because it’s so onerous,” remarked a white female owner of a professional services firm. [#I-60]
- A male representative of a minority advocacy organization reported that smaller firms are disadvantaged by lack of understanding the bidding process. For instance, one African American owner of a DBE, construction-related firm reported that he had lost contract opportunities ... due to unclear specifications. He commented, “That’s the biggest problem ... I was the lowest bidder; I didn’t know that I had to do 200 to 300 pages of submittals. It’s not clear.” [#TO-11, #I-09]
- When interviewed, a representative of a state entity reported that small contractors avoid state procurements. She commented, “Mostly it deals with the amount of paperwork that’s required to work with the government agency, and it is sort of complex; it takes some tenacity to get through that initial piece to really learn it.” [#FG-02h]
- “It takes a lot of effort, work and time” to prepare a bid and not win. She added, “It comes as a disadvantage [for small businesses] because we just don’t have the kind of personnel for that,” commented a female part owner of a WBE services firm. [#I-24]

- Regarding barriers to getting prime/sub work, a white female owner of a professional services firm reported that the RFP process has gotten so “stringent” that it is a disadvantage to small business owners. She added, “They look for ways to discount [certain] companies.” [#I-57]

The owner recalled that her company had a proposal rejected for not sending a cost proposal and scope of work in two separate FedEx packages, although her firm packed the deliverables separately in the same package. She continued, “Large and medium corporations have full staffs ... responding to RFPs As a small business, you spend 40 hours a week taking care of customers and [another] 40 hours a week looking for the new business” She went on to say that the [public sector] RFP process “almost makes it impossible” for a small business to compete. [#I-57]

Several business owners indicated that bundling of work limits small business participation.

A few examples follow:

- A Hispanic American owner of a formerly certified SDV construction-related firm reported that grouping sometimes “unrelated services” on contracts make it difficult to compete with larger companies. He said, for example, that “a generator maintenance [contract] ... will include emergency service.” He commented, “They are two different things If you can’t meet these demands, they just exclude you.” [#I-30]
- When interviewed, a white female part owner of a professional services firm reported that the bidding process and the way the state [bundles projects] precludes her small firm from participating. [#I-22]
- A white female representative of a certified (WBE, DBE) professional services firm also reported that large contract sizes and bundling of project tasks is a barrier to getting work with the state. A white male president of a professional services firm explained that making packages smaller, rather than being an entire project would be beneficial. [#I-02, #I-13]

Some interviewees reported that restrictive contract specifications can be a challenge for small businesses. [e.g., #AS-82, #I-02] For example, the African American owner of a DBE, SDVOSB construction-related firm reported that even what appear to be simple administrative requirements such as weekly meetings that might be necessary for large capital projects are a disadvantage for minority- and women-owned businesses and other HUBs with limited staff that typically are awarded only small construction contracts. [#I-09]

A state agency representative spoke about the indirect-costs requirement and how it affects small businesses. “Professional services firms that try to work with CDOT [for example] often have issues determining “the indirect cost rate.” She said, “[They] say, ‘I can’t make money ... because I’m a small business [and] my indirect cost rate’s really low. And the large, big guys have all this overhead, so their rates can be a lot higher’ Sometimes they don’t think that it’s cost effective.” [#FG-02h]

One reported CDOT’s Master Pricing Agreement (MPA) disadvantage small businesses. Regarding CDOT’s MPA requirement, a white owner of an ESB professional services firm commented, “... they should completely revisit [the MPA] requirement for small firms. I would actually eliminate that requirement for small firms because it’s a very cumbersome, technical, accounting problem. I was going to try to get enough CDOT work to not have to an MPA, because the MPA is just not a good deal. That’s the biggest take away from me, get rid of the MPA and you might get more small businesses pursuing work.” [#I-34]

Some participants shared that financial barriers, as well as bonding and insurance, often prevent minority- and women-owned firms and other small businesses from securing contracts with the State. [e.g., #I-11] (More on these topics is found in Part A of this appendix.) Interviewees reported on state requirements and “flow-down” requirements from prime to subs, for example:

- A male representative of a minority chamber reported that smaller companies will always have an issue with getting bonded. [#TO-09]
- A representative of a state agency reported, “... there’s ... opportunity for anybody who can get a bid bond on a small project to come in with no prior experience.” He said that acquiring a bid bond is usually one of the “first hurdles” for small contractors, and noted, “We even allow bid securities by check.” [#FG-01b]
- The representative of a state program stated that subcontractors need to be able to carry “60-, 90-, 100-days’ worth of receivables” and have the “financial history” to bond. She later commented, “It’s challenging for folks [who have] a challenging ... financial history to get bonded, because it’s a requirement at the subcontractor level ... not from CDOT but from the prime.” [#FG-01f]
- The representative of a state agency said that prime contractors pass down prequalification requirements to subcontractors: “They have flow-down clauses ... and it is a challenge for a lot of small businesses to carry the same level of insurance and bonding that’s required of the prime.” [#FG-01f]

State agency representatives and others reported that prequalification was a challenge for small businesses. Examples follow:

- Some state agency representatives agreed that contractors’ success “truly ... comes down to being financially viable.” [#FG-01b, #FG-01e]

One representative further explained, for example, that businesses must provide financial statements and have adequate bonding capacity as part of CDOT’s prequalification process for general contractors. He continued, however, “We don’t have any requirements to prequal them as a subcontractor, [and] that’s probably why they tend to pursue the subcontracting opportunities ... versus general contracting.” [#FG-01e]

- A white male president of a professional services firm stated, “I would have a special type of qualification procedure ... Small firms have a difficult time [with prequalification] and can’t afford to do that.” [#I-13]
- A white male part owner of a WBE/ESB professional services firm reported, “Specifically, I would like to see ... a list of pre-qualified [specialized] professional services firms [that specifies professional services firms for utilization by primes] ... That we’re actually being picked on our qualifications.” [#I-36]

Another reported on “self-perpetuating” barriers as an outcome of qualifications-based awards. The representative of a public agency described qualifications-based selection as “a self-perpetuating barrier.” He said that because of this, restricted contracts and set asides are mechanisms “that become really critical.” [#FG-02b]

Another interviewee stated that “best value” bidding out-weighs the benefits of “low bid.” A Native American male owner of a DBE construction-related firm commented that doing “best-value proposals” rather than low bids will “get better contractors.” [#I-07]

One minority chamber representative reported that “sole source” contracts can be used to exclude minority businesses. This African American female representative remarked, “Sometimes the sole source designation has been used to eliminate small black firms.” [#TO-04]

Input on contractor-subcontractor relationships. Business owners and representatives were asked to comment on their experiences with prime contractor-subcontractor relationships, particularly when working on projects with the State of Colorado or other public sector agencies in the Colorado marketplace.

One African American male part owner of a DBE/MBE/WBE construction-related firm reported that, in Colorado, efforts made by primes to engage subs belong in one of two categories: “nepotism” or “tokenism.” [#I-08]

One minority chamber representative indicated that building prime-sub relationships falls on the prime’s shoulders. She said, “Primes [in Colorado] need to do a better job of reaching out and finding and building relationships with subcontractors.” [#TO-04]

Some primes reported “preferred relationships” with subs who have worked for them before, making it difficult for new subcontractors to get a foot in the door. For example:

- A white male representative of a construction-related firm reported, “We do work with a couple of sub-contractors ... we have a couple of ‘preferred relationships’ ... for the most part we work with a small handful of preferred relationships.” [#I-19]
- When interviewed, a white owner of a construction-related firm reported that he sends invitations to subcontractors that he has worked with in the past. He said, “It’s the 30-year relationships.” [#I-27]

- A white female president of a professional services firm indicated that she has only used subconsultants she has known or who have been referred to her. [#I-28]
- Regarding hiring subs, a Hispanic male owner of a formerly certified SDV construction-related firm reported, “Most of them who have worked with me, I’ve known them for years.” [#I-30]
- A white female owner of a professional services firm reported that she normally finds subconsultants through alumni networks and her own personal network because she reported difficulty finding good, reliable subconsultants she otherwise can trust. [#I-74]
- Regarding building relationships with minority-owned firms, the white male representative of a chamber of commerce reported, “You have to hold big companies’ ‘feet to the fire.’ Otherwise they’ll go with relationships that are easier for them.” [#TO-01]
- Regarding barriers, the Asian American part owner a certified (SBE, DBE, MWBE, EBE) professional services firm reported, “[Primes] only give subcontracts to their friends and people they know. This is the biggest corruption that exists in this place.” This interviewee stated that primes and the government agencies they do work with “do not have minority business owners’ interests in mind.” [#I-05]

Other interviewees reported on how new prime contractor-subcontractor relationships are built. For instance:

- A Native American owner of a DBE construction-related firm reported “We are looking for people who fall into the same molds as we do, that have the qualifications, work experience and working relationships [that make it easy for us].” [#I-07]
- “When I include another business ... it’s usually in response to a specific requirement for a project and the other business is specific to an expertise ... it’s the expertise that I’m going for,” remarked a white male owner of a professional services firm. [#I-42]
- A white female representative of a construction-related firm reported that the firm finds subs by looking at a list of vendors published by cities and industry organizations. Another business owner emphasized the importance of having online access to downloadable interested vendor lists to know who is interested in projects. [#I-39, #I-34]
- A white male representative of an industry association reported, “I know that CDOT has a plan-holders list, which has evolved as it has moved to online bidding ... I believe that is a way a subcontractor can both keep track of the projects and know which contractors are thinking about bidding as a prime to reach out to those firms.” [#TO-06]

- The white female representative of a minority chamber stated, “We’ll have a large corporate member reach out and ask us ... our huge resource for our corporate partners that want a woman-owned business ... then we just make a recommendation to them ... we do that all the time ... at least once a month.” [#TO-07]
- “One of the roles of the [chamber] is to provide opportunity through networking, seminars, workshops, activities that bring people together so that people have a chance to get to know each other before the RFP is due,” commented an African American female representative of a minority chamber. [#TO-04]
- When interviewed, a Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported, “[The] DBE directory, I’m assuming, or maybe previously working with the subs they already know of to make it easy for them.” [#I-14]

Many interviewees reported prime contractor-subcontractor relationships, and related challenges. [e.g., #I-22, #I-27, #I-32, #I-35, #I-45] Comments include:

- A white female owner of a professional services firm reported two or three instances where she reported a problem with a prime, and that was regarding past-due invoices. [#I-04]
- A Hispanic American female representative of a minority representation industry association reported that about 20 to 30 percent of our subcontractors have issues with the primes and some of them do come to us and we try to help in any way that we can.” [#TO-03]
- Regarding contractor-subcontractor relationships, an Asian American male owner of an MBE-certified construction-related firm reported, “I perceive the contractor-subcontractor relationship as sub-optimal in the field of construction.” [#I-46]
- An Asian American owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that working with some primes is better than others. He added that some primes have “harsh contract language.” [#I-03]
- An Asian American female owner of a DBE professional services firm reported that establishing and maintaining personal relationships with prime contractors is one of the most challenging aspects of getting started in the business. She added that even when a sub can establish a relationship with a prime, it is often difficult to maintain. She commented that a subcontractor’s success is tied to the prime’s success. [#I-10]
- An Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm reported, “I would say that working on state level projects, contractors-subcontractor relationships ... they seem a bit overwhelming ... [primes] deal with hundreds of subcontractors and I’m just a number ... the margin for error is pretty much zero” [#I-20]

- When interviewed, a white owner of an ESB professional services firm reported that although DBEs and ESBs give prime contractors a competitive edge on proposals, it is ultimately up to the prime contractor to divide up project work. He indicated that prime contractors do not always provide DBEs and ESBs with the amount of work they initially propose. [#I-34]
- “Boy it really depends on the parties ... there can be a power struggle ... and you wind up having a difficult time doing your job,” remarked a white male president of a professional services firm. [#I-13]

One trade association representative reported that in the best-case scenario, primes and subcontractors/subconsultants can develop a symbiotic relationship where both parties benefit.

She said, “I believe that the primes do work with those subs in so many different ways that may not be known.” She explained, for example, that prime contractors might know from experience how the cities “like their invoices done or bundled ... [or] what they need for prequalification in order to be on a team.” She continued, “And so, those primes are working with those subs in order to ensure all their ducks are in a row ... and [the subs] get paid in a timely manner.” [#FG-04b]

The same association representative went on to say that this relationship benefits the primes by mitigating their risk. She commented, “When they know each other well and help each other out, they’re mitigating that risk for delays, for claims, any of that kind of thing.” She added that she believes there is “more mentor-protégé type things going on” than people realize because they are “informal” relationships and not necessarily organization- or agency-backed. [#FG-04b]

Some of business owners reported to rarely or never utilize subcontractors on public sector jobs or other projects. [e.g., #I-04, #I-26, #I-36, #I-45]

Many interviewees reported that primes do not engage minority- and women-owned firms and other small businesses as subcontractors unless there is a subcontract goal. Comments follow:

- The representative of a state agency reported that on federal highway projects primes tend to self-perform in absence of subcontract goals, and commented, “... that’s kind of the bottom line.” She added that she assumes it would probably be the same on state-funded projects. She indicated that with no mandatory goal or incentive that encourages that participation, saying, “They’re not actively seeking [minority- and women-owned firms and other HUBs as] subcontractors.” [#FG-01f]
- The African American female representative of a minority representation industry association reported, “I hate to say it, but I think [when] the goal is placed on the project ... [primes] know they need [to do] outreach I think every contractor out there looks at that same thing.” [#TO-02]

The same association representative added, “The goals help build [HUB] companies, but [primes won’t] go out and make a special effort in hiring them [in absence of goals],” commented an African American female representative of a trade association. [#TO-02]

- The Asian American female owner of a DBE professional services firm, “Getting requested by [primes] to be on their proposals ... it’s almost as if they’re just ‘checking off a box’ but not wanting to develop or continue a relationship ... in [my] experience, prime contractors do not try to establish or maintain relationships with subs unless they are required to do so.” [#I-10]
- “Yes, I think all the bids from primes are going to 80 to 90 percent DBEs or small businesses,” commented a Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm. She added, “The only reason they use us is to meet their goal, no other reason.” [#I-14]
- “It was usually federal stuff [when primes would] contact me [for] my certifications,” commented a Hispanic male owner of a formerly certified SDV construction-related firm. [#I-30]
- The white female owner of a professional services firm reported that her firm has partnered with certified businesses because her business does not qualify for certifications. She reported that the firm has built “great relationships” with some of the certified businesses. [#I-57]
- “If they have a percentage that they’re supposed to reach for DBE goals, that’s when the primes reach out to subconsultants,” commented an Asian American male owner of an ESB/DBE construction-related firm. [#I-12]
- The African American female representative of a minority chamber reported that efforts to encourage inclusion must be spelled out specifically from the RFP and bidding documents to the contracts. [#TO-04]
- A white female representative of a construction-related firm reported that the firm does make efforts to include HUB firms, though high contract goals are a challenge. [#I-39]

A number of business owners and representatives reported to encourage participation from Historically Underutilized Businesses — some of these interviewees were HUBs themselves. [e.g., #I-02, #I-06, #I-11, #I-38, #I-44, #I-75a, #TO-07, #TO-09b] For example:

- An Asian American owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that he has worked with many certified firms. He added that he encourages them and participates in the mentor-protégé program. He commented that he has built relationships with a number of firms to help them grow. [#I-03]
- “We are really big on ‘culture’ ... we try to make sure to provide good opportunities, because by providing opportunities and by us being a leader, and us being able to educate other minority firms, I think that would make a difference all around ... because a lot of firms, they don’t have the experience I’ve had, so I always try to share,” remarked an African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm. [#I-18]

- “With a lot of the current conditions, we would love to use [HUBs] as a criterion for hiring subcontractors,” commented a white male owner of a professional services firm. [#I-41]
- A white female owner of a professional services firm stated that she actively tries to find small and disadvantaged businesses to take on as subcontractors with the caveat that quality of work takes precedence. [#I-44]
- Regarding efforts to include HUB firms, a white female owner of a professional services firm reported, “Yes, specifically Hispanic American-owned businesses.” [#I-80]
- “We have some large companies that we work for that encourage and insist on diversity,” commented a white male owner of a construction-related firm and member of the LGBT community. [#I-79]

For some other business owners indicated that engaging HUBs as subcontractors is not a priority. Responses follow:

- A white male part owner of a WBE/ESB professional services firm reported, “It’s kind of outside what I do. There’s not a lot of opportunity for that. See that’s kind of outside my lane. I wouldn’t be in much of a position” [#I-36]
- The white female owner of a professional services firm reported that she does not attempt to hire certified firms or small businesses as subs because she and her husband are the only employees at the firm. [#I-04]
- “We only look at their thought process ... at no point did we look at anyone other than for their body of work,” remarked a white male owner of a professional services firm. [#I-31]
- “We hire whoever’s qualified ... for us it’s all about your skill level,” remarked a Hispanic American partial owner of a professional services firm. [#I-76]
- A white owner of an ESB professional services firm reported that his firm does not explicitly seek out HUBs including MWBEs and firms owned by persons with disabilities or members of the LGBT community. He explained that while his firm has used certified firms in the past, subs he engages are chosen because they have the best reputation or qualification for that service in the market. He noted, “... if you put too much of a ‘DBE’ requirement here in the Western Slope, there just aren’t that many [certified] firms that provide the services that we need.” He added, “We want the best people to win us the best job.” [#I-34]

One trade association representative discussed the barriers primes face when engaging minority- and women-owned businesses or other small businesses on contracts with the State of Colorado or other public agencies. “Some of our firms require bonding of all subs or bonding of subs for contracts of a certain size ... I think that’s one of the bigger issues ... I guess another part is the capacity of the firm, is the firm big enough to take on the subcontracting opportunity that’s there, is there a way to break it down. A flip side of that is depending on how much work is going on and what firms specialize in different areas, is there still capacity to find certified firms in different categories,” remarked a white male representative of an industry association. [#TO-06]

Some business owners and representatives discussed whether minority- and women-owned businesses and firms owned by persons with disabilities or members of the LGBT community could be successful in obtaining work on public sector contracts without special efforts to hire them. Some interviewees reported that HUBs would struggle without special efforts in place, and that they need a “leg up.” [e.g., #I-12, #I-50, #I-60] Comments include:

- A Hispanic male owner of a formerly certified SDV construction-related firm reported that special efforts to engage HUBs “does give us a leg up.” [#I-30]
- An Asian American male owner an MBE/DBE professional services firm reported that HUBs would be at a disadvantage without special efforts to hire them. A Native American male owner of a DBE construction-related firm also reported, without special efforts, “It would be a lot more difficult.” [#I-06, #I-07]

A Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported, “[Successful without a leg up] ‘no’ ... that’s the only way they are going to give us an opportunity.” [#I-14]

- The white female owner of a WBE professional services firm explained why it would be a lot more difficult in the marketplace without special assistance stating, “The reason why is because the system is set up to replicate the system. What I mean by that is, the people who are already in the know about how to navigate that process are usually not the disadvantaged business that you just stated ... right now, honestly, it’s too complex, it takes too much time, I don’t understand it, it feels confusing. I just don’t even feel like there is an opportunity for me.” [#I-01]
- A white owner of an ESB professional services firm reported, “It’s just difficult because [HUBs] are small They face the same challenges [ESBs] face ... the commonality of being small. And then if the [certification] requirement wasn’t there they would be exactly where I am, it’s even more challenging. So, without that requirement it would be really difficult [for a HUB] to get some state contracts” [#I-34]

- An African American female representative of a minority representation industry association explained that for HUBs “barriers for them are many ... it is our responsibility that other companies know who they are and that they are trustworthy. It’s not always going to be a white company that gets the work, times are changing, and they have to realize they need to give [disadvantaged] firms a chance.” [#TO-02]
- A white male owner of a professional services firm reported, “I really can’t give an opinion A lot of the firms that fall under those programs that I have worked with have been extremely well run and competent firms. It’s not like they absolutely need the special programs to succeed.” [#I-42]

Feedback on finding opportunities to bid with the State of Colorado as a prime or a sub.

Prime contractors and subcontractors/subconsultants interviewed reported how they identify opportunities to work with the State of Colorado, and any barriers they face.

Many primes reported the use of Rocky Mountain e-purchasing system BidNet and Connect2DOT (partnership between the Colorado Department of Transportation and the Colorado Small Business Development Center Network); some also use Colorado Vendor Self Service (ColoradoVSS) and specified department websites. For primes, e-purchasing sites are often combined with networking and word of mouth. Some reported employing designated staff to identify opportunities to conduct work with the state and other public agencies. [e.g., #I-01, #I-04, #I-06, #I-07, #I-19, #I-26, #I-27, #I-30, #I-32, #I-36, #I-39, #I-42, #I-44, #I-61, #I-64, #I-72, #I-75a] Responses include:

- A Hispanic American female representative of a minority representation industry association reported, “Primes will have their bidding software.” She also commented that primes will reach out to her organization to find work. [#TO-03]
- Regarding how primes find out about public/private sector work, an African American male representative of a minority-owned professional services firm reported that personal connections and getting information from government agencies is the way that some primes find work in the public and private sector. [#I-75a]

Interviewees reported on how subcontractors find out about opportunities to bid or propose on the State of Colorado or other government agency projects. Many business owners reported barriers to finding out about opportunities to bid with state and other public agencies. [e.g., #AS-02, #AS-14, #AS-16, #AS-50, #AS-56, #AS-57, #AS-58, #AS-75, #AS-76, #AS-77, #AS-78, #AS-79, #AS-171, #AS-172, #AS-173, #AS-174, #I-11, #I-32, #I-42, #I-43] For example:

- A white owner of a professional services firm reported, “I look things up on the website, or I might hear something It’s not very often when I am being contacted. Usually I have to be the proactive one.” [#I-52]
- An Asian American male owner of an MBE-certified construction-related firm reported that it is challenging learning about work with the state. [#I-46]

- When surveyed, the Hispanic American female owner of a services firm reported, “[We face] difficulties finding bids through Colorado ... because we are a small company.” [#AS-128]
- African American female partial owner of a professional services firm reported that the process for finding out about work opportunities is not easy and takes a lot of research and effort on her part. This interviewee added that the information is not readily available to her with the resources that she has. She explained that she ends up Googling things and “going down the rabbit hole” through different links. She also added that she is not a paid subscriber of BidNet; and, because of that, she recognizes that more of the work falls on her. [#I-51]
- When interviewed, a white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported that she learns about opportunities from the CDOT website which has a list of upcoming projects. She reported that as you become familiar with them, you can get on their email list, then you can decide whether you want to bid on any bidding opportunities as they become available. She commented that you have to purchase an annual membership, to bid however, and be prepared to bid often to make the investment worthwhile. [#I-21]
- A white owner of a construction-related firm reported that VSS, the state’s procurement system, is not user friendly. He added, “There have been times when their distribution of documents will be inconsistent or weird. The job will start off in VSS and then once they’ve had the mandatory pre-bid, they stop using it ... I have had some issues with communications” [#I-27]

Some other interviewees reported that subcontractors/subconsultants rely on networking and industry associations, direct solicitations from primes (commonly via email), bidding sites and online planholders’ lists as well as other means to identify procurement opportunities with the state. [e.g., #I-03, #I-12, #I-16, #I-29, #I-36, #I-37, #I-42, #I-60, #I-67] Other responses follow:

- Regarding how subs find out about public and private sector work, a white female owner of a professional services firm reported that participating in networking events and joining industry-based organizations knocks down barriers, and this includes checking an entity’s website or joining their mailing list. [#I-04]
- When interviewed, a Native American male owner of a DBE construction-related firm reported receiving emails from primes. [#I-07]
- The Asian American owner of an ESB/DBE construction-related firm reported that primes reach out to his firm via word of mouth. He also reported that the firm has a paid subscription with BidNet which sends updates through a daily email. [#I-12]

- Regarding how subs find out about public or private sector work, by entity, a Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported to receive email solicitations and stated, “If you go online and check what’s going on CDOT, you go to plan-holders lists and you start approaching [primes] if you’re interested.” [#I-14]
- Regarding how subs find out about public and private sector work, the African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that the firm’s estimators receive bid-solicitation emails and check the bidding sites. [#I-18]
- “There’s four to five different websites that you have to pay for,” remarked a white male part owner of a professional services firm. [#I-29]
- A white owner of a construction-related firm highlighted the importance of personal relationships and being solicited for work directly. He said, “I think so much of it is bid invitations.” He noted that all of the subcontractors he has worked with in the past have been solicited directly via phone calls. [#I-27]
- A white part owner of a WBE/ESB professional services firm reported that work can be found in government sites and other sources like BidNet. He added that sometimes primes will reach out to subs directly when they need help on specific projects. [#I-36]
- “[Members of the trade association] sometimes just get a call to be alerted about a bid coming up. Online communication is where most of the information comes from,” commented an African American female representative of a minority representation industry association. [#TO-02]
- A white male owner of construction-related firm reported finding subcontractors through social media (Facebook) and suggestions from suppliers. [#I-38]
- Regarding how subs find out about public/private sector work, an African American male representative of a minority-owned professional services firm reported that personal connections and getting information from government agencies is the way that some subs find work in the public and private sector. [#I-75a]
- When discussing how subs find out about work, a Hispanic American female representative of a minority representation industry association reported, “By making a connection.” [#TO-03]
- Regarding how subs find out about public sector work, an Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that some subs wait for people to find them. [#I-03]

Several industry association representatives reported being a resource for prime and subs seeking opportunities with the state and other public agencies; however, the information they disseminate is often limited to what is provided to them by those agencies. For example:

- “We have tried to do a better job of distributing information ... if the agency sends us the information, we send it out to our membership,” remarked an African American female representative of a minority chamber. [#TO-04]
- “Our organization sends out weekly community news and with that news are links to CDOT, City and County of Denver ... anything these agencies send our way we will blast it out to our members,” commented a Hispanic American female representative of a minority representation industry association. [#TO-03]
- The female representative of a minority business organization reported that they have 8,500 newsletter subscribers. She explained, “One of those things that goes into the newsletter is basically we give a summary of what is going on. Then the different networking opportunity going on. [#TO-05a]

The same organization representative reported that they do not report on activities in the community, but they send out information regarding training sessions from different community organizations and the process for different certifications. She added, “At the end, there is information specifically about contracting opportunities.” [#TO-05a]

Suggestions for improvement to State of Colorado procurement practices. Many interviewees offered their insights on ways to improve the State of Colorado and other public sector procurement protocols. [e.g., #I-02, #I-27, #I-32, #I-80, #FG-02h]

Some indicated that access to statewide requests for bids/proposals should be centralized, and procurement protocols should be streamlined, include less paperwork and deliver consistent information. Comments follow:

- “I would at least encourage the state to try to have everything in an easily accessible spot as opposed to checking with each department and each division to see what bidding opportunities they have ... if you’re trying to do that once or twice a week and going through 20, 30 or 40 different websites, that quickly becomes the major part of a person’s job, so it’s just one more expense for that small business,” remarked a white representative of an industry association. [#TO-06]
- A white male owner of a services firm reported, “If there were a [centralized state] website that announces projects, then I would take advantage of it.” [#I-35]
- “RFP practices can be pretty daunting,” remarked an African American owner of a professional services firm. He added that having a simplified process would allow for more access and success for smaller companies. [#I-45]

- “I think sometimes administrative processes ... they might have been designed in like the 1980s and they haven’t been changed There is just this need to always adapt and make things easy,” commented a white female owner of a professional services firm. [#I-60]
- Regarding suggestions for improving procurement practices, a white female owner of a DBE/ESB professional services firm reported, “To have one go-to person that you go talk to about it ... I haven’t found one well-rounded person” [#I-61]
- “There needs to be a liaison for everyone who applies ... if they want the program to work, they have to designate oversight ... that paperwork is complicated government paperwork,” remarked a white male owner of a construction-related firm. [#I-64]
- The female representative of a state program stated that the biggest hurdle for small contractors trying to perform state work is “our process and our paperwork.” She described it as “challenging and overwhelming” for small contractors. Suggesting it be streamlined, she added, “I think it is intimidating for small contractors to even bid on our jobs.” [#FG-01c]
- While discussing suggestions for improvement to public sector procurement practices, an Asian American male owner of an ESB/DBE construction-related firm reported, “Some of the information on CDOT’s website is ... outdated Some of the programs they use are hard to follow sometimes ... you will get conflicting information.” [#I-12]

Some interviewees reported on the state’s responsibility to offer training and readiness-building to assist minority- and women-owned businesses and other small businesses build capacity. Responses follow:

- Regarding suggestions for improving procurement practices by participating entities, an African American male part owner of a DBE/MBE/WBE construction-related firm returned frequently to mentorship programs and hands-on professional development programs, as key recommendations for the state. [#I-08]
- An African American female representative of a minority representation industry association reported, “I would like to see more one-on-one activities. Something that will absolutely give small businesses the education they need to succeed.” [#TO-02]
- A white female representative of a minority chamber reported that the State of Colorado should encourage partnership, provide training and resources for partnerships and provide funding to help women grow their businesses enough to begin to bid. She added, “What I’d love to see, is not just having a male-owned business take a contract and hire a woman-owned business just because he knows that it will help him get the contract, I’d like to see more women-owned businesses partnering with each other ... or women-owned businesses that all come together to bid on a state project They don’t have the employees, so they can’t bid on it, but if they could participate together.” [#TO-07]

To increase diversity in the bidding pool and among contract awards, interviewees reported the need to focus state efforts on improving existing practices and developing new, more effective initiatives.

Responses follow:

- “Make sure it’s balanced and fair and promotes opportunities for minorities,” remarked a white male representative of a professional services firm. [#I-15]
- The African American female representative of a minority chamber reported that inclusiveness must be specified from RFP/RPQ to the contracts. [#TO-04]
- A male representative of a minority advocacy organization reported, “Metrics ... that’s one way to encourage HUB participation, to recognize that it’s a systemic issue that’s one way to address it.” [#TO-11]
- An Asian American owner an MBE/DBE professional services firm indicated that an institutionalized certification program in the State of Colorado would educate project managers, and contract managers on the value of working with diverse populations. He added that for the federal government, it is a “way of life” and a way to encourage diverse populations to become involved. [#I-06]
- Regarding suggestions for improving procurement practices, a white male veteran owner of a professional services firm reported, “The RFP process can improve ... it is a lot of work for little return. I do think if they want to attract more valuable businesses then they need to have some kind of ‘point system’ involved.” [#I-58]
- The African American female representative of a minority representation industry association reported, “What I would like to share is that we’re all so busy right now, but I don’t think we have taken the time to nurture our small businesses the way we probably could.” She added that there should be opportunities to help these companies learn and give them resources to give them some support than they previously have done. [#TO-02]
- “I think that state agencies should hire minority-owned companies and have a requirement to work with minority firms ... each state should have a ... minority-contractors app, or database,” commented an African American male owner of an SBE/MBE-certified professional services firm. [#I-43]
- A female representative of a minority business organization reported, “I have been advocating for this for a long time: communication. At the state level, they do not have a way to officially identify certified firms [or HUBs]. The City and County of Denver has a directory that is great ... but at the state level, we don’t have a list or a way to identify those companies.” [#TO-05a]
- A Hispanic American female representative of a minority representation industry association reported state entities could implement “restricted projects for small businesses.” [#TO-03]

- A representative of a minority chamber reported that making second and third tier subcontract opportunities available would also allow for businesses to get their foot in the door and start developing relationships with government agencies. The interviewee also commented that being more transparent about diversity spending would be good. [#TO-09b]
- The African American female owner of a professional services firm cautioned that any government efforts to promote racial diversity need to be more than just “virtue signaling.” [#I-59]

A chamber of commerce representative indicated a need for the state to assess the type of work being procured and look for ways to be more inclusive of work that women typically perform. The white female representative of a minority chamber reported, “... a lot of the contracts come from the ... the state, they don’t start with the companies that women traditionally operate, so it’s like construction, transportation, you know these bigger types of businesses that women don’t have, and so a woman-owned business will see that and go, ‘Oh well, I’m not going to do that’ ... where in fact there’s probably an opportunity in there somewhere for [woman-owned] businesses.” [#TO-07]

Some reported the need for an emphasis on local business participation. For instance, a white female part owner of a WBE general services firm reported, “I think they [should] put out ... a regional bid ... [with] a size and money set aside for small businesses [to have a chance].” She added, “[bids] need to be looked at as not as a price point, but to want to support local companies as well.” [#I-24]

D. Conditions in the Colorado Marketplace for Historically Underutilized Businesses (HUBs) Including Businesses Owned by People of Color, Women, Persons With Physical or Mental Disabilities and Members of the LGBT Community

Business owners and representatives reported on whether there is a level playing field in the Colorado marketplace, and any associated barriers. Topics include:

- Whether there is a level playing field for minority- and women-owned firms or other HUBs in the Colorado marketplace;
- “Good ol’ boy” and other closed networks;
- Issues with prompt payment;
- Denial of opportunity to bid or unfair rejection of bid;
- Submitting bids or proposals and not getting feedback;
- Bid shopping and bid manipulation;
- Knowledge of false reporting of good faith efforts or front companies; and
- Unfair treatment or disadvantages for minority-owned and women-owned businesses and other HUBs in the Colorado marketplace.

Whether there is a level playing field for minority- and women-owned firms or other HUBs in the Colorado marketplace. Many business owners and representatives reported whether there is a “level playing field” in Colorado for minority- and women-owned businesses and other HUBs. [e.g., #FG-03a, #I-02, #I-19, #I-21, #I-24, #I-26, #I-27, #I-28, #I-38, #I-48, #I-50, #I-77, #I-80, #TO-03, #TO-06]

“We have a really long way to go ... everything from just overt racism to institutionalized barriers on [who] cannot get access to financing, to loans at what rates, to the lack of networks and cross-cultural networks where businesses are learning about the opportunity,” remarked a white female representative of an industry association. [#TO-08]

“I don’t think it is a level playing field ... the government seems to have these programs that mean well, but they are not run well,” remarked a white male owner of a construction-related firm. [#I-64]

For varying reasons, many interviewees reported a playing field that is not level for HUBs. [e.g., #I-05, #I-06, #I-09, #I-11, #I-17, #I-25, #I-36, #I-54, #I-63, #I-65, #I-67, #I-73, #I-75a, #TO-01, #TO-04, #TO-09a] Examples follow:

- Regarding whether there is a level playing field for HUBs, a white female owner of a WBE professional services firm remarked, “There’s no way that there is. The systems are set up to work in a specific way that generally does not do a lot to include them. Because of that, when business owners who are of those marginalized groups don’t know how to navigate the system, they end up falling away I’m sure if they did this research, it’s going to be mostly white men who are ... landing the proposals with the State.” [#I-01]
- The representative of a public entity said that there are not as many resources for HUBs. She commented, “If you’re not a white male-owned firm ... it’s probably harder to get a loan ... make those connections [or] get into those circles.” [#FG-04e]
- The white part owner of a WBE/ESB professional services firm reported that there is evidence of “good ol’ boy” networks in the State of Colorado. He commented, “I wouldn’t so much describe as a white man’s network When you’ve got a DBE, who falls into that category, who is part of the ‘good ol’ boy’ network, it’s almost impossible for anyone else to compete. The playing field is not leveled. I want there to be advantages for the LGBT community, I want there to be advantages for the disabled people and for people of color because they do face an uphill battle” [#I-36]
- A white female representative of an industry association reported, “There is an element of bias (conscious or unconscious) that goes into purchasing ... there still is some very intentional discrimination going on ... access to capital, relationships, mentorship ... that plays out in businesses ... they go with the person that they do know, and that’s somebody in their network that’s probably another ‘white business’ owner.” [#TO-08]

A number of interviewees reported an unlevel playing field for minority-owned businesses. Some reported inequities in access to capital and financing. Others reported difficulty securing work as a minority business owner. Comments include:

- A white female owner of a professional services firm reported that the industry is likely very intimidating, noting the lack of diversity in leadership in the area. She commented, "... it could potentially be an intimidating environment. When you look at the hierarchy, you're not seeing any diversity." [#I-44]
- The African American female owner of a professional services firm remarked that minorities struggle to get access to capital and that "opportunities do not exist" without access to capital. She commented, "When you look at diversity initiatives that are put in place ... the dollars tend to start heading in the direction of those white women first The Black community and Black women are still at the bottom of that totem pole." [#I-59]
- A minority female owner of a professional services firm reported having a female African American business owner as a client whose target is small business owners who are also African American. She indicated that her client "has been denied funding on multiple occasions." She concluded, "I have gone through her financials and there is no reason why she is being denied." [#I-62]
- An Asian American veteran male owner of a professional services firm commented, "It is difficult to win any contracts as a minority veteran, [I] gave up already." [#AS-127]
- The African American male part owner of a DBE/MBE/WBE construction-related firm reported that it is nearly impossible for minority-owned firms to get public sector work without help from the inside. [#I-08]
- The African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm reported, "Minority firms struggle with people not trusting them to do projects." [#I-18]
- A female owner of an Asian American-owned DBE professional services firm reported, "[I've] been in meetings ... where derogatory statements were made about minority firms in general, like, 'Oh yeah, we have to include those minority firms ... eyerolls.'" [#I-50]
- "[Minority-owned firms face] struggles and sometimes when they hear our accents, they just think we are 'useless.' [Primes] say that we don't meet their requirements," remarked an Asian American owner of a professional services firm. He added, "Minority business owners all say that only people firms know get the contracts." [#I-05]

- “The economic system in America ... does not necessarily lend itself to African Americans being successful in an integrated economy. Historically, when the Black community had to rely on itself for all its needs and services, entrepreneurship and small businesses thrived,” reported an African American female representative of a minority chamber. She added, “There is certainly a perception that not all firms across industries are treated equally.” [#TO-04]

Some reported that there is not a level playing field for women-owned businesses. For instance, some woman reported not being taken seriously or not having equal access to contracts because of gender. Comments follow:

- The white female representative of a minority chamber reported that bias in the playing field plays a role for women in business. She commented, “There’s just this bias that a woman-owned business can’t handle the contract.” [#TO-07]
- A white female owner of a WBE professional services firm indicated that “there have been instances when ... gender has affected her chances of receiving a contract.” [#I-01]
- A white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported, “In the construction world, a woman kind of looks odd.” [#I-21]
- A white female representative of a certified professional services firm reported, “Obviously in my industry it is mostly men.” [#I-02]
- A white female owner of a DBE/ESB professional services firm reported, “What I found is ... it depends on the field they’re in, women in construction ... it’s hard, men just usually don’t like to work with women in construction I’m pretty sure if it was between a man or a woman, they would choose a man.” [#I-61]

Some reported that there is not a level playing field for businesses owned by persons with physical or mental disabilities or for firms owned by members of the LGBT community. Overt discrimination, “very real” safety issues and limited access to support unlevel the playing field for business owners with physical and mental disabilities and firms owned by members of the LGBT community.

- A white male owner of a construction-related firm and member of the LGBT community reported, “Companies just don’t have the insight about hiring those firms.” [#I-79]

- Regarding a level playing field, the white female representative of an industry association reported, “From the LGBT community perspective, I feel like the barrier that they are up against is more overt discrimination. If ... a business ... markets or prides themselves or really is out there on being LGBT-owned, then the barriers they face are more overt discrimination.” [#TO-08]

The same association representative added, “On the disability side ... that’s our greatest area of weakness, and ... that in itself it is a testament to the fact that ... the barriers they are up against are pretty substantial.” [#TO-08]

- For persons with mental illness, there is not a level playing field indicated one business owner, “No there’s not ... many of them don’t have their parents to consult ... it’s a socio-economic issue ... if you don’t have a support system [as a person with] mental illness that’s not way fair ... I uninvitedly had a leg up because my parents owned small businesses,” commented a white male owner of a DBE professional services firm. [#I-32]
- A white male part owner of a WBE construction-related professional services firm commented, “... just based on the nature on the work that we do ... for [businesses owned by persons with physical and mental disabilities] it would be difficult” [#I-16]
- “There are still a lot of ‘good ol’ boy’ clubs. It’s not safe to be out in every industry and you still have to make a choice in business whether you are going to come out or not, as a part of your interaction with that client or potential client. That struggle is still very real,” remarked a male representative of a minority chamber. [#TO-09a]

Both representatives of the chamber went on to say that the LGBT certification is not recognized by widely recognized across the State of Colorado which unfairly disadvantages businesses owned by members of the LGBT community when competing in the Colorado marketplace. [#TO-09a, #TO-09b]

A number of business owners and representatives reported their insights on what gives one firm in the industry an advantage over another. [e.g., #I-10, #I-14, #I-16, #I-26, #I-29, #I-32, #I-33, #I-39, #I-41, #I-46, #I-51, #I-54, #I-58, #I-75a, #I-76, #I-77, #I-80] Examples of responses by topic follow:

- Several interviewees reported that knowledge of the public sector procurement process is an advantage. For example, an African American male owner of a DBE, SDVOSB construction-related firm reported that understanding requirements, experience and personnel give one firm in the industry an advantage over another. [#I-09]

- A number of business owners reported connections as important. For instance, the Asian American male part owner of a certified (SBE, DBE, MWBE, EBE) professional services firm reported that connections can be more important than experience or certifications in giving a firm an advantage over another. [#I-05]

A white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported, "... sometimes it's who you know, creating relationships and keeping good relationships." [#I-21]

"Honestly in my business it's really who you know. I would say that people that have a large social network and professional networks and use those networks to get referrals. That would give a company that does what I do an economic advantage over another," commented the white female owner of a WBE professional services firm. [#I-01]

- Some commented that quality work and client satisfaction advantage some firms over others. For example, an Asian American male owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm commented that "doing good work" and "client satisfaction" gives one firm in the industry an advantage over another. [#I-03]
- Some mentioned the "catch-22" for firms that need to build certain experience but cannot get work without having that experience. The female owner of an Asian American-owned DBE explained that clients seek firms with niche expertise, such as work for airports or schools "even though you might be putting in similar designs." She described that "a lot of times the owners ... say, 'How many airports have you done?' That it is challenging for small businesses to build such a niche resume compared to a large firm with a department devoted to that niche area." [#I-50]

"Experience would be the biggest thing" according to a white female owner of a professional services firm. [#I-80]

- Large size and capacity and "deep pockets" advantages one firm over another some said. For instance, the white female representative of a certified (WBE, DBE and others) professional services firm reported that the ability to do more work on a project gives one firm an advantage over another. She added, "Other firms that I compete against, they have enough staff that can take on a larger project." [#I-02]

A white female owner of a professional services firm reported, "The size of the firm ... if they have more employees, they can have more capability to respond to projects." [#I-54]

A white female part owner of a WBE general services firm reported, "Probably how deep their pockets are. If they can chase a larger fish and if they can put their pockets on the floor." The African American male owner of a professional services firm reported, "Having the resources to get the work done." [#I-24, #I-45]

- Low price is an advantage, particularly for low-bid contract awards. The African American part owner of a DBE/MBE/WBE construction-related firm reported that pricing is a factor that gives one firm advantage over another. He commented, “People are looking for the lowest price.” [#I-08]

A representative of a state agency indicated that awarding contracts solely based on low price can be an advantage for large firms and a disadvantage for small businesses. [#FG-03b]

- Some mentioned best value contracts as an advantage for some firms. For instance, the Native American owner of a DBE construction-related firm commented that when there is consideration beyond low price in a proposal, small firms benefit. He added, “When the owners do best value and not just lowest price ... that’s definitely an advantage for us, when we can show them letters from our past clients to see what their impression was after the work was completed” [#I-07]

Two interviewees suggested that due to the entrepreneurial nature of the Colorado marketplace and competitiveness of bidding, every business has equal footing to succeed or fail in the Colorado marketplace. This white male representative of an industry association argued, “It’s so entrepreneurial ... it doesn’t matter your creed, your race, your religion, your sexual orientation, your gender, anybody can do that, anybody can fail at it, anybody can succeed.” [#TO-10]

“I don’t feel that there is collusion, I think the competitiveness of the bidding is number based ... I don’t know of a situation when somebody’s higher bid has been chosen over the higher bid ... I don’t feel that anything is underhanded,” remarked a white female representative of a construction-related firm. [#I-26]

“Good ol’ boy” and other closed networks. Many interviewees reported on closed networks that exclude minority and female business owners, and other small businesses outside of the network. [e.g., #I-03, #I-08, #I-10, #I-12, #I-14, #I-18, #I-20, #I-21, #I-22, #I-23, #I-28, #I-29, #I-32, #I-38, #I-40, #I-42, #I-44, #I-46, #I-47, #I-51, #I-52, #I-54, #I-61, #I-64, #I-65, #I-71, #I-72, #I-73, #I-75a, #I-76, #TO-02, #TO-05a, #TO-07, #TO-09a]

Many reported barriers resulting from closed networks. For example, a white female owner of a professional services firm reported, “... a ‘good ol’ boy’ network tells me that that is a closed system, a closed belief system, a closed perspective system, a closed behavior system and that is not a system that is going to welcome innovation and new perspectives and empathy.” [#I-60] Other comments follow:

- An Asian American owner another DBE professional services firm reported that he observed closed networks in the Colorado marketplace that are about relationships such as “who you golf with, which country club you belong to and where you go out to dinner.” He added, “There is a ‘good ol’ boys’ club that is still very, very ... prevalent and they have their favorites that they go to.” [#I-06]

- When surveyed, an African American female representative of a male minority-owned professional services firm reported, “[We] have substantial issues infiltrating the ‘good ol’ boy’ system.” [#AS-198]
- The Hispanic American part owner of an MBE/SBE/DBE construction-related firm reported that closed networks exist and that his firm was once included, he commented, “We were there, we were in the ‘big leagues.’ And it was a ‘privilege.’ I worked my butt off to get there and be one of the ‘good ol’ boys.” [#I-67]

The same business owner added, “If you’re a minority trying to get into that ‘good ol’ boy’ network, ... it’s much harder. And I would agree that absolutely a ‘good ol’ boy’ network exists, and if you’re not in it, you’re out of it ... It’s a hinderance.” [#I-67]

- An African American female representative of a minority chamber reported, “Historically ... business has always been done based on relationships ... people do business with people they know, people they like, and people they trust ... too often in America but certainly in Colorado specifically, those kinds of relationships that get business done are not the relationships that Black businesses have.” [#IO-04]
- The white part owner of a professional services firm commented, “It was extremely hard to break in [because of] a lot of ‘good ol’ boys.” He added, “Start-ups cannot even be considered for a project.” [#I-29]
- Regarding closed networks, a white female owner of a WBE professional services firm commented, “Absolutely!” She added, “That’s why it’s difficult for new consultants to break into the market. I’ve been doing this for a long time now ... and there are still lots of organizations I am not able to work with. [#I-01]

The same business owner continued, “I had [a prime] call me ... and they wanted a proposal, the woman got back to me and said, ‘Oh, I didn’t realize my CEO already had a consultant that he knew from before,’ that he’s going to hire [instead]. That kind of stuff happens all the time.” [#I-01]

- Regarding closed networks, a white male owner of a construction-related firm and member of the LGBT community reported, “I’d say there’s always things behind the scenes that you can imagine” [#I-79]
- An African American male owner of an SBE/MBE professional services firm reported, “Many of us have barriers because there is a ‘good ol’ boy’ network and you have to figure out how to get in that network to get approved ... but even if you do get approved you don’t get paid until 90 days, so ... then you go try to get a loan but you cannot get a loan fast enough ... your contract is the collateral.” [#I-43]
- A white male representative of a chamber of commerce reported, “I think it exists, probably on purpose and yet sometimes just naturally ... we have a very large Air Force group here in Aurora. We call them ‘ring-knockers’ because if you’re an Air Force graduate of the Air Force Academy, that door seems to open.” [#IO-01]

- The Hispanic American female representative of a minority representation industry association reported that “good ol’ boy” networks exist in Colorado. She commented, “We cannot grab a project up North in the Fort Collins area because of the ‘good ol’ boy’ network ... as well as in the Western Slope and Colorado-Kansas border.” [#TO-03]
- An African American female owner of a professional services firm stated that the nature of business and banking is based in forming and maintaining relationships. She added, however, that the business leaders who have an audience with government leaders in the state are predominantly “old dollars.” She recalled attending a committee meeting with local business and government leaders and noted that the membership of that committee was predominantly older, white and male. [#I-59]

The same business owner remarked that contracting firms and agencies do not advertise to minority-owned firms in good faith. She added that bidding opportunities are not widely advertised, leading to fewer qualified minority firms participating in the bid. She commented, “[They] say they’re not at fault because we didn’t apply, so they go with who they know. That’s where that ‘good ol’ boy’ network comes into play.” [#I-59]

- Regarding how primes find out about public sector work, a white male president of a professional services firm reported, “There are a lot of contractors that use the ‘good ol’ boy’ system That is way more likely than being [hired] based off qualifications.” [#I-13]
- A male representative of a minority advocacy organization reported, “If there’s one of those big contractors that works with the same subcontractors all the time ... and that is just the way it’s going to be ... you’re really alienating people ... if there isn’t a competitive subcontract.” [#TO-11]
- The white female owner of an Asian American-owned DBE professional services firm reported that closed networks exist in Colorado comparing them to her former area of business, where male engineers refused to hire women. She stated that in Colorado she knows of one large firm in which the “good ol’ boy” network is “alive and well.” [#I-50]

Some specifically gave evidence of a “good ol’ boy” system perpetuated by the State. Many reported that “good ol’ boy” and other closed networks make it difficult for HUBs to compete in the when pursuing work with the state and other public agencies. Examples follow:

- Responding to a survey, a white female owner of a goods business reported, “... most state agencies would rather work with the “good ol’ boy” network rather than pursue new relationships with women-owned businesses.” [#AS- 560]

- The African American part owner of a DBE/MBE/WBE construction-related firm reported that it nearly impossible to get work with the state without help from ‘the inside.’ He commented, “Where does it begin for a small business owner? It takes a small business owner to get a family member, or to get a cousin, or to get married or something in the state government for them to become a company that can get big and do work consistently I can understand the ‘good ol’ buddy’ system because without that factor there is no way you can make it.” [#I-08]
- A white female representative of an industry association reported that “good ol’ boy” networks do affect firms in the Colorado marketplace. She commented, “Instead of [public agencies such as the State] teaching a workshop on how the old boys’ network can diversify their portfolio, their workforce, their vendors, they are trying to teach people of color how to ‘code switch’ so that they can do business with the ‘good boys’ club.” [#TO-08]
- The male representative of a minority business organization reported on closed networks, “When they are going through a bid and loss, [typically] who won that bid is the ‘same company’ that has had that contract for a while.” He added, “I consistently hear that from our companies in different industries It makes it difficult to pursue [work] ... they feel like their voice is not heard. [Without] past performance with that specific agency ... they cannot [win contracts and] grow.” [#TO-05b]
- When asked if “good ol’ boy” networks impact HUBs, an African American part owner of a DBE/MBE/WBE construction-related firm responded, “Absolutely!” He commented that closed networks are a major issue in the Colorado marketplace explaining, “The small companies ... trying to make it, are not getting [state] opportunities ... jobs are going directly to the big companies But those companies don’t do the work, they give it to their ‘cousin’ that they had start a seal coater asphalt business a few years back. They’re making ‘X’ amount of money off the government, as long as the job is gets done nobody ever ‘opens the curtain.’” [#I-08]

The same business owner reported that minority-owned companies are not getting opportunities for work because many larger contractors that have a closed network of “token MBEs” they use “year after year” for subcontracting. [#I-08]

- The white owner of an ESB professional services firm indicated that the CDOT Non-Project Specific (NPS) process is a closed network. He commented, “The CDOT NPS process is ... ‘relationship-based,’ and getting to know some of the local agency decisionmakers is difficult.” [#I-34]

The same business owner later commented, “[There are] bigger firms [who] look better on paper because they can produce a shinier proposal, and they have broader experience ... [but] there’s a boatload of small firms that can do a lot of small CDOT projects [too]. We just can’t get into the game.” [#I-34]

- When asked about the existence of “good ol’ boy” networks in Colorado, a representative of a state agency said, “We have to be careful when we’re writing a solicitation, [so] that we’re not writing it in such a way that it unduly favors ... a large firm.” He explained that some general contractors might sometimes list specialty “tools” in a solicitation, knowing that only certain firms own or have access to them. [#FG-02f]

Some interviewees reported that although closed networks likely still persist, relationship-building and loyalty are an expected part of doing business; a few reported no knowledge of closed networks. [e.g., #I-04, #I-27, #I-35, #I-39, #I-57] Comments include:

- The white president of a professional services firm reported, “Oh yeah, [‘good ol’ boy’ networks] make a big difference. But it’s also not a derogatory term, either. It’s just called networking.” He added, however, that these networks can be a disadvantage to smaller firms that are not as well-known. [#I-13]
- “I think sometimes you get a little ‘word of mouth,’ but no, I have not directly seen it It’s usually people who are showing up and working hard who stay,” remarked a white male owner of a professional services firm. [#I-41]
- A white male veteran owner of a professional services firm reported, “I don’t think in our industry that plays a factor. Our industry is fairly young ... so we have a very young population running the show. It’s a lot different than other industries” [#I-58]

Issues with prompt payment. Many interviewees provided comments about untimely payments, including that the State of Colorado’s payment practices cause barriers for certified businesses and other small firms. [e.g., #I-07, #I-08, #I-11, #I-13, #I-22, #I-23, #I-35, #I-38, #I-40, #I-42, #I-45, #I-54, #I-59, #I-60, #I-65, #I-66, #I-67, #I-74, #I-76, #I-80, #TO-01, #TO-03, #TO-04, #TO-05a, #TO-09a]

Prompt payment issues directly or indirectly disadvantage HUBs with limited resources. Comments include:

- An African American male owner of a professional services firm reported experiencing barriers to receiving payment due to racist undertones from a general manager of one of their clients. [#I-17]
- A white female president of a professional services firm reported that some companies consistently pay late. [#I-28]
- Regarding payment issues at start-up, a white male part owner of a professional services firm reported, “I actually had to wait tables We had to wait a long time to get paid. Essentially, everyone was using us as a bank.” [#I-29]

- Regarding prompt payments, a white female owner of a WBE professional services firm reported that receiving prompt payment from Colorado state agencies can be a challenge, it is part of working with government agencies. She added, "... I am going to have to wait 60 to 90 days for payment That means, economically, I have to be in a place where I don't need the money ... that can be a problem." [#I-01]
- Regarding multiple challenges he faces, a Hispanic American male partial owner of an MBE/SBE/ DBE construction-related firm commented, "Timeliness of payments is horrendous in this industry and market. Your ability to weather ... certain storms and challenges and cycles of project start-up are already hard, and when you throw in the fact that access to lines of credit, access to specific contract terms that expedite your payments to you ... it's challenging." [#I-67]

The same business owner added that the average amount of time in accounts receivable is 60 to 70 days from day of billing to the day of collection. He commented, "... that is particularly difficult for a young business of any gender makeup ... to overcome, but you add on top of that the disparities that minorities might have in access to bank capital ... that's challenging." [#I-67]

- The Asian American male owner an MBE/DBE professional services firm reported that prompt payment is a "big issue." He commented that the ordinance mandates that invoices must be paid within 30 days, but if the prime submits the invoice it may take months for the agency to approve it. [#I-06]
- "That's always been an issue ... unless you can float for 90 days without getting paid, you're not going to start a business," remarked a white owner of a DBE professional services firm. [#I-32]
- A Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm remarked, "The problem that we see now ... statewide ... they are trying to pay DBEs 30 days from the invoice date instead of when they get paid That is going to [indirectly] affect small businesses because ... because how can you pay [subs] out of your pocket ... knowing they have not paid you yet ... [primes] are going to reduce [their] utilization of small businesses." [#I-14]
- A white female owner of professional services firm reported that some private contractors have "stiffed" her in the past. She added that being in a small community "takes its toll" as she sees former clients who have yet to pay her for services rendered. She commented, "It's just not worth it to me to do collections for them." [#I-44]
- An Asian American female owner of a DBE professional services firm reported that public entities are more reliable for promptly paying her for completed work. She commented, "You don't have them flaking out on paying." [#I-10]

- An Asian American owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that prompt payment has not been an issue. He commented that there have been issues surrounding invoices that were sent to primes who then delayed submitting to the agency right away and ultimately delaying payment for several months. [#I-03]

A few reported complaints related to prompt payments, with both positive and negative outcomes.

For instance:

- “I can tell you that we’ve gone through those discussions with the legislature this year, around prompt pay and retainage ... it’s an issue that resurfaces every so often,” commented a white male representative of an industry association. [#TO-10]
- A white female owner of an Asian American-owned DBE professional services firm reported two instances of prompt payment issues. She stated that her firm waited nine months for payment from a prime, and when the payment was made by the prime it was “significantly less” than what her firm had billed. She explained that she felt there was little recourse as taking the prime to court would be costlier than the losses on the project. [#I-50]

Commenting on a second incident, the same business owner reported that a prime was late to pay her firm. She added that the project manager connected her with the appropriate parties who then “forced the payment.” [#I-50]

- The Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm indicated that CDOT is helpful in cases of late payment. She commented, “We feel protected because we are a certified small business.” She added, “I know if there is an owner that hasn’t paid me, I call ... CDOT It was a lot of help” [#I-14]
- Regarding challenges with prompt payments, an African American owner of a DBE, SDVOSB construction-related firm reported that he paid a lower-tier subconsultant on time, but the payment was deposited late by that subconsultant who then, in turn, complained to the prime and his firm was fired by the prime. He commented, “We got knocked out of substantive work in the construction phase.” [#I-09]

One focus group participant suggested how state agencies could remedy prompt payment concerns. While participating, a focus group representative of a professional services-related trade association indicated that there should be a better evaluation of how quickly state agencies pay prime contractors, and how quickly those primes pay their subs. She commented, “There should be a better evaluation on both sides. Prompt pay is huge to me. Everybody should be paid promptly.” [#FG-04b]

The same trade association representative went on to say that whole invoices should not be “held up” because “one little thing” is yet to be verified. She commented, “Hold on that, but pay everybody else.” [#FG-04b]

One interview commented that from the general contractor’s perspective although prompt payment issues exist, some primes pay their subs on time. The white male owner of a construction-related firm reported that there are likely issues with prompt payment, but added, “With some owners, yes. From the general contractor side of things, where the bulk of my career has been spent, I think the companies I worked for were pretty fair with subs and paid in a timely manner.” [#I-27]

Denial of opportunity to bid or unfair rejection of bid. Business owners and representatives reported on their knowledge or experience with denial of opportunity to bid. [e.g., #I-13, #I-22, #I-23, #I-54] For example:

- The African American part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that he has been denied a bid due to “discriminatory” presumptions of his company and experience. [#I-18]
- One minority female business owner experienced denial of opportunity to bid from purchasing agents in public sector, saying, “They can improve their procurement process. I really had some high hopes that things were going to change. One thing I did not like was depending on [which agency] I approached, I had to go through the purchasing agent. I felt discriminated against ... the system behind needs helps. They need more communication to get through this guy so you can actually have a ‘chance to propose’ before getting shot down.” [#I-62]
- A white female owner of a professional services firm reported that she might have been unfairly rejected, although it is difficult to tell because she is not able to see who ultimately won the bid and where she might have improved. The white male part owner of a WBE construction-related professional services firm also reported on the uncertainty that is perpetuated by the bidding process, and said, “I may have been excluded from bidding, but I will never know.” [#I-44, #I-16]
- One American female owner of an SDV/SBE/DBE/WMBE professional services firm commented, “I’m pretty much told not to bother ... they consistently are using people who are known to them.” [#I-20]
- The white owner of a construction-related firm reported that in two-step bidding processes, he has been qualified but not selected for the second step. He offered, “It does happen if it is a two-step process where you are ‘qualified’ and for whatever reason you’re not invited to the next step.” [#I-16, #I-27]
- Commenting on his experience with unfair rejection of a bid, a Native American male owner of a DBE construction-related firm reported, “Yes, a big project for us is the [specified project] ... we were rejected for one phase of a project that was a ‘small business set-aside’ that required experience doing \$100,000,000 projects.” [#I-07]

Some other business owners indicated no experience with unfair rejection of bids. [e.g., #I-21, #I-23, #I-28, #I-34, #I-35, #I-36, #I-42, #I-51, #I-65, #I-66, #I-67, #I-68, #I-74, #I-75a, #I-76, #TO-06]

Submitting bids or proposals and not getting feedback. Lack of feedback from the prime or public agencies causes challenges for small or certified firms. Unless self-initiated, some never hear bidding results, others never get the feedback they need to improve their bids and proposals. [e.g., #I-05, #I-06, #I-13, #I-16, #I-20, #I-23, #I-28, #I-35, #I-42, #I-44, #I-52, #I-59, #I-60, #I-65, #I-66, #I-71, #I-74, #I-76, #I-80] For example:

- A white female representative of a certified (WBE, DBE) professional services firm reported, “I had submitted a proposal CDOT has this horrible online proposal system that is so hard to understand I did exactly as instructed in the RFP which was I called somebody at CDOT and he confirmed that my screen said submitted ... then I never heard back if I was selected for this proposal and when I checked back in with CDOT they responded with, ‘We never received your submission.’” [#I-02]
- An Asian American owner a professional services firm reported, “When you submit your proposal after they all say they want to hire minorities, you don’t hear a ‘damn word from them’ I know I didn’t fail, it’s the state and the city.” He added that these entities want to entirely help minority businesses. [#I-05]
- One Asian American female owner of a DBE professional services firm described one instance wherein she tried to get feedback on a failed bid and did not receive any. She suspected that it may have been due to her minority status but continued that she tries “not to dwell on it.” [#I-10]
- The white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm reported that the burden lies on the individual submitting to request the feedback, although some folks are too busy to do so. A white owner of an ESB professional services firm reported, “You can get feedback but you have to go seek it out.” He explained that after submitting a proposal and not winning the project, he had a meeting with CDOT just to get feedback. [#I-21, #I-34]
- The white female owner of an Asian American-owned DBE professional services firm noted that public agencies typically provide consistent feedback “because they are being scrutinized by the community and they have to show that they are doing their due diligence.” [#I-50]

The Hispanic American male partial owner of an MBE/SBE/DBE construction-related firm stated, “I’d say the government entities are generally more forthcoming with bid results [than are general contractors.” [#I-67]

Bid shopping and bid manipulation. Many business owners described their experiences with or knowledge of bid shopping and bid manipulation. [e.g., #I-01, #I-05, #I-07, #I-13, #I-16, #I-22, #I-23, #I-27, #I-42, #I-52, #I-57, #I-60, #I-67, #I-76]

- An Asian American female owner of a DBE professional services firm reported, “They always shop it around. I heard of a case of a manipulated bid from one of the women engineers that I talk to. She kind of rolled over and just took it.” [#I-10]
- One African American female partial owner of a professional services firm reported multiple experiences with bid shopping. She added that her firm offers a very low-cost service and because of that, she suspects that bid shopping is often involved when potential clients see her bid but choose to go with another firm. [#I-51]
- The Hispanic American female owner of a professional services firm reported, “Yes, DPA is the only agency that does this.” [#I-66]
- “We encourage that actually ... in the public sector, it’s always good for someone to get another competitive quote or bid on a project so they can make an informed decision, and not only that, but they’ll know your value,” remarked an African American male representative of a minority-owned professional services firm. [#I-75a]
- The Hispanic male owner of a formerly certified SDV construction-related firm reported, “I was beat out by another company I was going to bid [against] on [a] City of Aurora job, but they basically already have the vendor in mind They write the bid basically for that vendor so that people like me can’t compete for that vendor.” [#I-30]
- The white female representative of an industry association reported, “Yes ... I think there’s a lot of pressure to come in with the lowest bid, and that often comes on the backs of the contractors, the subcontractors and the employees. That’s why I think that best value contracting is so important.” [#TO-08]
- The Native American owner of a DBE construction-related firm reported that he is opposed to bid shopping and many of the firms they work with know that. [#I-07]
- A white part owner of a WBE construction-related professional services firm reported, “We had a municipality that asked us to give them an idea of a project and a rough budgetary number, and then they took our rough budgetary number gave it to a competitor, [the] competitor underbid and gave them the project.” He continued, “In [that], instance a municipality should issue an RFP for a project of that size, but they didn’t” [#I-16]
- A white president of a professional services firm reported, “Yes, I got messed up by a very well-known architectural firm and stiff-armed by a local person. There are several of those [instances].” He added, “It’s a disadvantage to anyone.” [#I-13]

Some interviewees indicated no experience with or knowledge of bid shopping or bid manipulation. [e.g., #I-21, #I-28, #I-34, #I-36, #I-42, #I-68, #I-74, #I-80] However, the African American female owner of a professional services firm stressed that it is difficult to know whether bid manipulation is occurring due to the lack of any feedback. [#I-59]

Knowledge of false reporting of good faith efforts or front companies. The study team asked interviewees about their knowledge of false reporting of good faith efforts, fraudulent reporting of DBE participation or front companies.

A few business owners and representatives reported evidence of false reporting of good faith efforts or fronts. [e.g., #I-60, #I-67, #TO-02] A few comments follow:

- A white female representative of a certified (WBE, DBE and others) professional services firm reported, “One experience I had as a DBE, I was supposed to get a certain amount of work and it didn’t happen So yes I think [false reporting of DBE participation] happens.” [#I-02]
- The Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm reported, “We bid a project with a huge company ... and they [included us for] \$6.4 million, but [we received substantially less] They used to laugh in front of us ... he keeps saying in front of me, ‘You’re nothing’ ... they said it was our problem, but we know it was not our problem” [#I-14]
- One white female owner of a professional services firm reported that she is suspicious of larger businesses when soliciting her consulting services because they reach out to her firm to fulfill their good faith efforts. [#I-44]
- The Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm reported, “A lot of woman-owned businesses ... some of them [serve as a pass-through to spouses running the business], which is an absolute disservice to people like me who are not married and have sole-ownership, so those types of businesses severely hurt those like me.” [#I-20]

Focus group participants commented on the “dynamics” surrounding good faith efforts.

The representative of a public entity reported that prime contractors have wanted to see it “turn into a checklist” for a long time in order to quantify their efforts. He added it is a “challenging dynamic” for primes because there is a risk associated with hiring new subcontractors. He commented, however, that part of making a good faith effort is “opening up that door and giving ... that opportunity.” Another focus group participant emphasized that good faith efforts are important. [#FG-01a, #FG-04b]

Unfair treatment or disadvantages for minority-owned and woman-owned businesses and other HUBs in the Colorado marketplace. Business owners and representatives reported on evidence of any unfair treatment they experienced or observed in the Colorado marketplace.

Many business owners and representatives reported experience with unfair treatment specific to minority- and women-owned firms, and other HUBs, when pursuing opportunities in the Colorado marketplace. [e.g., #AS-5, #AS-26, #AS-43, #AS-46, #AS-47, #AS-47, #AS-52, #AS-122, #AS-129, #AS-254, #AS-247, #AS-261, #AS-353, #AS-489, #AS-558, #AS-559, #AS-598, #I-06, #I-14, #I-43, #I-75a]

The white male owner of a professional services firm reported, “I find if I send women or Hispanics to a job site they get treated differently [than white men] ... there are different expectations if I send a white guy.” [#I-47]

Some firms reported incidents of covert or overt discrimination, including stereotyping of minority-owned businesses. For instance:

- An Asian American male owner an MBE/DBE professional services firm reported that there are underlying issues that you cannot actually prove, but you can tell by “tone.” [#I-06]
- A male representative of a minority advocacy organization reported, “We know [that] historically [unrepresented] communities are disadvantaged When you look at the number of contracts awarded to Black-owned business, or to Latino-owned or to women-owned ... those are things that we measure and the data [are] really bad.” [#TO-11]
- The Hispanic American male representative of a minority chamber reported, “As Hispanic or a person of color, you need to work harder We’ve always kind of known this in a lot of different ways.” [#TO-12]

The same chamber representative added regarding people of color, “You need to work harder than the next person to be able to go through and get the same exact opportunity, and then sometimes it’s not even there.” [#TO-12]

- Regarding evidence or observation of unfair treatment when pursuing opportunities in Colorado, an African American part owner of a DBE/MBE/WBE construction-related firm reported a persistent atmosphere of covert discrimination. He commented, “You’ll never speak on it. You’ll never say, ‘Hey this guy was black, so he didn’t want to deal with me.’ But sometimes you just know something is not right, like they weren’t expecting [a Black] person to show up.” [#I-08]

- An African American owner of a DBE, SDVOSB (and other certifications) construction-related firm discussed some of the challenges that he faces as a black male, including racial stereotypes and the barriers to housing and capital. He reported, “Racism [although not like it used to be] ... still happens.” [#I-09]

The same business owner went on to say, “As far as starting a business, especially as a minority firm, you have to have all your stuff in one sock. You have to be methodical ... you don’t have the comfort or forgiveness of any types of other firms.” [#I-09]

- Regarding evidence or observation of unfair treatment when pursuing opportunities in Colorado, an African American part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that he has observed firms not wanting to do work with him even though he has the necessary experience, funds and certifications. He added that he is judged for his race and for being an MWBE. [#I-18]

The same business owner later commented, “If you’re a WMBE firm, from the first moment you get on a project they are always going to think you’re ‘incapable,’ you’re not going to be able to finish the job.” [#I-18]

- Regarding evidence or observation of unfair treatment when pursuing opportunities in Colorado, a Hispanic American partial owner of a professional services firm reported, “None of it’s really verbalized In my experience in the past 20 years people have had preconceived notions of who I am because of my last name I’ve fired clients because of their open bigotry about my race.” [#I-76]

- Regarding unfair treatment when pursuing opportunities in Colorado, a Hispanic American owner of a professional services firm reported that he has been the victim of racially motivated verbal abuse in public. He commented, “I have been called a “terrorist” or other racist names.” [#I-73]

- When asked about unfair treatment in the industry, a male representative of a minority business organization reported, “I see a different struggle [for diverse businesses] where they need to change the way they present themselves and allow themselves to be heard. [While] for me it is easier.” [#TO-05b]

- An Asian American owner of a certified (DBE, WBE, SBE, ESB, MBE) professional services firm reported that there is always some unfair treatment based on his ethnic background. He noted that it happens about 20 percent of the time but said that he does not focus on it. [#I-03]

- An Asian American female owner of a certified (SDV, SBE, DBE, WMBE) professional services firm reported, “I think it’s worse for the Hispanic population even though they are our primary work-force, I’m’ pretty sure they are facing a tone of racism, too I’ve heard it on the job site.” [#I-20]

- An African American person with disabilities and owner of a professional services firm reported, “I have experienced racial barriers [in the marketplace].” [#AS-218]

- The Hispanic American female owner of a professional services firm reported, “There is zero representation from Spanish speaking inspectors.” [#I-66]
- Participating in a survey, the Hispanic American female owner of a professional services firm commented, “[Colorado] is not receptive to Latinas.” [#AS-711]

Some firms reported incidents of covert or overt discrimination, including stereotyping of female-owned businesses. For instance:

- Responding to the survey, a white female owner of a construction-related firm reported that being a woman in the industry results in discrimination and stereotyping. [#AS-602]
- An Asian American female owner of a DBE professional services firm described a general feeling of gender discrimination and wariness of her small business stature. She added, “I feel that quite a bit ... women in construction ... have to act smart or smarter.” [#I-10]
- An African American representative of a minority-owned professional services firm reported, “Especially towards women ... I can tell within the culture of Denver. It’s called ‘Men-ver.’ That’s the nickname of Denver!” [#I-75a]
- A white female owner of a professional services firm, when surveyed, reported, “[In Colorado], there is a lot of bigotry against women ...” [#AS-700]
- The Asian American female owner of a DBE professional services firm commented, “When you’re first starting off, you’re young and pretty and svelte so you get the ‘cat calls.’ When you’re old and you dress like an engineer, it doesn’t happen anymore.” [#I-10]
- The white male part owner of a WBE construction-related professional services firm reported that general contractors treat female employees differently on jobsites. [#I-16]
- One white female owner of a WBE/DBE/SBE/EBE professional services firm reported, “Females get harassed a lot on sites.” [#I-71]
- A white female part owner of a WBE general services firm reported, “It certainly has happened. I try not to make it a factor. But there have been times where you are dealing with somebody, especially on the equipment side, when they would rather buy from a man than a woman because it makes them more comfortable.” She added, “It is a male-dominated business, after all.” [#I-24]
- “My wife has a much more difficult time dealing with a lot of the men we deal with because we are in a field of construction that typically women aren’t in They trust me more over her,” remarked a white male owner of a professional services firm. [#I-47]

- A white female owner of a professional services firm reported that larger firms will partner with her to have her perform only the most undesirable portions of the work. [#I-44]

The same business owner explained that she is frequently the only woman in many local networking groups. She contends with the assumption that she is not considered to be as tech-savvy as her male colleagues. “I can hang with my techs,” she said. [#I-44]

- The Hispanic American female owner of a professional services firm reported that on job sites she has been called “sweetheart” and asked, “What can I help you with?” She continued, “There’s always this sense in the field that working with me is going to be easy [and that] I’m the only one who has to prove my work” [#I-66]
- When asked about unfair treatment in the industry, a female representative of a minority business organization reported, “Yes, it definitely happens. I think it happens mostly because of doubting the performance of a company.” [#TO-05a]

A male representative of the same organization reported, “Speaking as a new member of this community as a male, it has been easier for me to engage in some spaces where it is male dominant.” [#TO-05b]

- A white female owner of a professional services firm reported, “When we make proposal presentations with an extremely strong team of females ... we don’t feel as though we are ‘taken as seriously or given the same weight’ ... even though [we bring] some of the most skilled [women] in these particular jobs.” She said that when they present with a group on men, the “[proposal] presentations are [taken more] seriously.” She went on to say that she has found attitudes toward all-women teams to be “a little bit more dismissive [and incredulous].” [#I-57]

Some firms reported incidents of covert or overt discrimination, including stereotyping of businesses owned by persons with disabilities or firms owned by members of the LGBT community. For example:

- A white female owner of a professional services firm reported, “There have been ‘subtle’ things that have happened ... me and my business partner also have disabilities.” [#I-46]
- “My job was trying to help businesses [owned by] ... persons with disabilities ... the system was ugly,” remarked an Asian American owner a professional services firm. He added that he did not see much success. [#I-05]
- Regarding evidence or observation of unfair treatment when pursuing opportunities in Colorado, a male representative of a minority chamber reported, “We had two gentlemen in a presentation, and they were very uncomfortable with gay men. I do a lot of work on construction sites. I also speak Spanish and I can hear the things that are being said about me, about my team, at the site We do a lot of government work and run into a lot of misogyny, homophobia [and] lots of sexism.” [#TO-09a]

- The white male representative of a former WBE professional services firm reported that “the pool of decisionmakers for institutions ... has been largely ‘white and male,’ [and] they just know fewer of those people.” [#I-65]

The same business owner went on to explain, “There is a real bias [to] hire ‘who you know.’ And [the decision-makers noted] are less likely to know firms who are owned and represented by [minorities, women, members of the LGBT community and persons with disabilities].” [#I-65]

- The male representative of a minority advocacy organization reported, “The one issue we had is when you look at the definition of minority-owned business. LGBTQ businesses are not included in that definition ... we [are not] even measuring LGBTQ data.” He continued, “We can’t address what we don’t measure We as the LGBTQ community were not even represented in minority-owned businesses and any of the data that was collected around state contracts.” [#TO-11]

Some business owners and representatives reported limited awareness of unfair treatment of HUBs pursuing opportunities in Colorado. [e.g., #I-07, #I-28, #I-36, #I-37, #I-39, #I-64]

For example:

- The Hispanic male owner of a formerly certified SDV construction-related firm reported, “I don’t think anybody sees my last name and [disregards] my bid.” [#I-30]
- Regarding evidence or observation of unfair treatment when pursuing opportunities in Colorado, the white male owner of an ESB professional services firm reported, “I think sometimes we are at that competitive disadvantage with the CDOT aspect of things They’re just a big machine that says they want to work with small business, but it’s difficult to get the machine to open up its doors to us.” [#I-34]
- “There has been acknowledgement of some companies that do complain about not getting a fair shot at work, but sometimes use that as an excuse. Some just think they are not being treated fairly,” commented an African American female representative of a minority representation industry association. [#TO-02]

Many business owners and trade association representatives commented that double standards are prevalent in the marketplace and disadvantages minority- and women-owned firms.

[e.g., #I-10, #I-16, #I-59, #I-60, #TO-02] For example:

- “You can’t create a great track record if you never get the chance,” reported a Hispanic American male representative of a minority chamber. [#TO-12]

The same chamber representative added, “I think there is an unfair burden sometimes placed upon a minority firm in terms of [their perceived] capability, despite ... the credentialing, the previous track record.” He went on to say, “I don’t see necessarily the same kind of burden of proof on ... a male, white-owned firm.” [#TO-12]

- Regarding double standards, an African American male part owner of a certified (ESB, MWBE, DBE) construction-related firm reported that firms judge his work before seeing it. [#I-18]
- The Hispanic American partial owner of an MBE/SBE/ACDBE/DBE construction-related firm reported experience with double standards while performing work. He detailed, “We were the new person on the block ... we were the minority on that project, and they understood it. When we made mistakes, they were just ‘picked on’ versus other known entities, they trusted them, they believed they would make it right and correct it, and they didn’t have the hiccups or the challenges or the ‘scrutiny.’ Versus once we got on the wrong side of that equation, it was a ‘battle’ ... everything we did was wrong, and everything was scrutinized and overly scrutinized. [It was] was unfair.” [#I-67]
- “I’ll tell you what is unfair, and they say [this is] not out there anymore, but ... in the outer regions of the state, we will not pursue any work out there, and it’s very hard when we do. The normal [attitude there] is, ‘Why do we need a small company [or] need a DBE? Here we go, we have to babysit this small company because there is [a DBE participation goal] in this project,’” remarked a Hispanic American female owner of a DBE/MWBE/SBE construction-related firm. [#I-40]
- An African American male owner of a DBE, SDVOSB construction-related firm reported, [As a minority] you have to be better than others. In code you have what are called minimum standards, but it is up to individuals to go a step up For instance, you can cook a meal in 30 minutes, right ... but if you are a minority or a woman or whatever, you’ve got to cook it in 20 minutes. Your requirements, your expectations, are greater.” [#I-09]
- Regarding double standards, an African American male representative of a minority-owned professional services firm reported, “Oh yeah. For sure. Especially when it comes to the services industry ... this is definitely a ‘male cow town.’” [#I-75a]
- Regarding double standards, the white male president of a professional services firm reported, “There is so much to the business of engineering ... there is a lot of ‘weird stuff’ that goes on It kind of comes with the territory.” [#I-13]
- Regarding unfair treatment while working with a government agency with primarily male staff, a white female owner of a WBE professional services firm reported, “I ended up, after about a year of working with them, hiring an independent consultant ... who was a male because I felt like it would be more effective. Literally having worked with 100 of these male employees. I just felt like they didn’t see me as ‘credible’ and I felt like they would listen to a man better than they would listen to me.” [#I-01]

- The woman business owner remarked on assumptions made about women in her industry that create an unfavorable working environment. She commented, “People will ask if my husband is more technical. No, I’m the one that’s much more technical ... I don’t think anyone has ever asked [my husband] ‘which of the two of you is more technical?’” [#I-44]

Some interviewees reported that small businesses may also face scrutiny when trying to get their work approved for project launch, and for final payment. [e.g., #I-38, #I-43, #I-75a, #TO-04] Comments include:

- The representative of an engineering-related trade association reported that she knows of a woman-owned business that had a contract with a prime on a state project, but the state “took the work back in-house,” causing the woman-owned firm to lose the work. She commented, “That’s wrong. The state just took work away from an MWBE ... [And] took the work back [to do] in house.” [#FG-04b]
- At the request of the prime, the white male president of a professional services firm reported doing extra project that was not “acknowledged” or “compensated.” [#I-13]
- “The more players you have on a project, the more you’re going to have a hard time making everyone happy,” commented a white female owner of a certified (DBE, ESB, WOSB, DWOSB) construction-related firm. [#I-21]
- The white male owner of an ESB professional services firm reported experiencing changing standards with the local agency review. For example, low-quality plans may be approved by one review agency, while another review agency have higher standards. [#I-34]

E. Insights Regarding Programs and Certification

The study team asked business owners and representatives about their knowledge and experience of business assistance programs and certification. Topics discussed include:

- Contract goals programs or business assistance programs in Colorado; and
- Certification, advantages and disadvantages.

Contract goals programs or business assistance programs in Colorado. Interviewees discussed whether their firm has taken advantage of or has knowledge of any contract goals programs or business assistance programs in Colorado. Some reported that they have taken advantage of those programs. [e.g., #I-01, #I-02, #I-12, #I-13, #I-16, #I-31, #I-32, #I-35, #I-37, #I-79, #I-80, #TO-01, #TO-03, #TO-07, #TO-08, #TO-09a, #TO-10]

Some reported knowledge of the Federal DBE Program or other contract goals programs.

Some commented on the pros and cons of these programs. For example:

- The Asian American male owner an SBE/ESB/DBE/MWBE professional services firm reported awareness that CDOT has goals for DBEs. “Yes, CDOT has the DBE Program and we try to follow that too,” remarked a Native American owner of a DBE construction-related firm. [#I-03, #I-07]
- The minority owner an MBE/DBE professional services firm commented that the City of Denver has aspirational goals for design. [#I-06]
- The white representative of an industry association reported that firms he represents have taken advantage of contract goals and preferences programs. He commented, “We have members that are certified members, and they definitely have been able to take advantage of that ... they submit their quote for it and say, ‘We can do the work and we’ll help you meet your goal,’ and that’s going to stand out. [#TO-06]
- The representative of a public entity reported on their success with restricted contracts or set asides. He described restricted contracts as “a sheltered market piece,” adding, “I think there’s definitely a role for that.” He went on to say, however, that they haven’t been able to determine “a good enough criteria” for what good contracts are for that. [#FG-01a]
- “I think [contract] goals are important ... if an entity has a goal, the prime should reach that goal,” reported an Asian American owner an ESB/DBE construction-related firm. He added that in his firm’s case DBE certification has helped to generate work. [#I-12]
- A white female representative of a certified (WBE, DBE) professional services firm reported, “[I am] disappointed with the [Federal] DBE Program ... [only] \$2,000 out of the \$700,000 dollars I’ve billed in work over the last [few] years has been because of that program.” [#I-02]
- Regarding contract preference goals, the female representative of a trade association reported that she hears from MWBEs that they would like to see “big firms have more incentives to hire [them].” She commented, “They don’t like it that they’re just hired to meet a goal. They want to be able to demonstrate that they’re a valuable partner.” [#FG-04b]

Regarding the risk that primes take on when working with new subcontractors, the same association representative said, “A [contract] goal is okay, but you can’t have it so high that it isn’t worth the prime going after.” She reiterated that prime contractors should have incentives beyond contract goals to work with MWBE firms. [#FG-04b]

- The representative of a public entity commented that when implementing contract goals, especially for professional services, you should not “just plop a goal in there.” He continued, “You [have] to make sure it’s happening in areas where there’s naturally occurring subcontracting opportunities.” Regarding “the compliance piece,” he said, “There’s a lot of resources to do that right, [and] if you’re not willing to do that, in some ways you’re better off just not going down that path” [#FG-02b]
- A female representative of a state agency reported that of the community colleges that the agency represents, some have more resources and a bigger “knowledge base” than others. She reported, “Some of the goals that require a great deal of gathering information and reporting is difficult for some of our smaller colleges, because they [might] already [be] wearing three or four or five different hats” She went on to say that “more neutral kinds of goals” could be more easily built into procurement from the colleges. [#FG-02c]
- When asked about contract and price preference goals, a female representative of a state program stated that it “would be terrific” to have more resources to identify businesses and “invite them into what we’re doing.” She added, however, that there should be consideration for the difficulties that small, rural communities have in trying to meet benchmarks or percentage-based goals. She commented, “That’s going to be a little more difficult for those communities, so I would just like recognition [of that].” [#FG-03a]

Many business owners reported to have taken advantage of business assistance programs provided via the State of Colorado or other agencies or non-profits. Regarding business assistance programs, a representative of the State of Colorado reported that the agency offers business development, a mentor-protégé program, networking and one-on-one counseling for businesses, as well as a class on bidding. Interviewees reported taking advantage of a number of the programs hosted by the State of Colorado, as well as other public agencies. Examples follow.

The Asian American owner of an MBE/DBE professional services firm reported that he as responded to specific opportunities that had goals that were set-asides and that the city has a defined pool which is essentially a set-aside for a small MBE or WBE firm. He further added that he competed for an MBE and WBE firm contract that he has now. [#I-06]

Some interviewees discussed mentor-protégé programs or other business -connect programs and whether they are helpful. Many participated in such programs. [e.g., #I-03, #TO-11] Comments include:

- When asked if she has mentored others or participated as a protégé, a white female president of a DBE professional services firm reported that she has not due to her busy schedule. She remarked that the MWBE and DBE are very good and helpful but thinks that the mentor-protégé program could be more emphasized. [#I-11]
- “We were one of the firms selected for the mentor-protégé program that CDOIT rolled out ... we tried to make that work, it wasn’t successful in the end,” remarked a minority owner of a DBE construction-related firm. [#I-07]

- The Asian American owner an SBE/ESB/DBE/MWBE professional services firm promoted the mentor-protégé program at CDOT and that he is now a mentor to other firms. [#I-03]
- When asked about experience with mentor-protégé programs, a Hispanic American partial owner of an MBE/SBE/DBE construction-related firm reported that they are part of an SBA-approved mentor-protégé relationship. He explained, “It worked really well for us, we had a great mentor and we had a really unique concept.” He went on to credit their success in the mentor-protégé program to the fact that the two firms brought complementary services and did not offer the same type of work. He noted, “So together, we brought a big solution. Most mentor-protégés are [for example a] big electrical [firm], little electrical [firm]. There’s competition, there’s secrets, there’s territory So, the fact that we were complementing set of services I thought worked really well. [It] was initially frowned on by the SBA but I think we convinced them that [it made sense].” [#I-67]
- The representative of a state program reported that CDOT’s Connect2DOT program partners with SBDCs across the state. She commented, “We have a pretty comprehensive network of over 200 business consultants that are available.” She added that the small business owners who leverage that support “tend to do better [and] have sustainability over the course of [business] start-up ... and even into growth.” [#FG-01f]
- A Native American male owner of a DBE construction-related firm reported, “We obtained our DBE certification ... received a ton of help through Connect2DOT.” [#I-07]

Some interviewees sought assistance from business professionals and industry experts. Some business owners reported seeking expert assistance from attorneys, accountants and other experts. [e.g., #I-07, #I-14, #I-38, #I-41, #I-50, #I-68] For example, the Asian American male owner of an MBE/DBE professional services firm reported that he sought expert assistance when applying for SBA 8(a) certification which was difficult and labor intensive. [#I-06]

Some mentioned “meet and greets,” vendor shows and vendor lists, and whether they are helpful. For example:

- The white owner of an ESB professional services firm reported attending a “meet and greet” event held by CDOT. He said, “It was like speed dating. It wasn’t very effective.” [#I-34]
- The white female owner of a WBE/DBE/SBE/EBE professional services firm reported that she had attended a “meet and greet” that was “awkward” because many people were trying to get the attention of just a few primes, like a “stock show.” [#I-71]

- “I do really like when they do ... the vendor shows ... you can walk around and make those personal connections pretty quickly I do enjoy those because then I can actually get to talk to people in the decision-making process,” reported a white female representative of a construction-related firm. [#I-39]
- The white representative of a former WBE professional services firm reported, “I just think some of the, kind of job fair type things ... [would provide] a chance for people to meet each other and build some sense of connection.” He went on to explain that it could be similar to a networking event, adding, “It’s obviously helpful when an entity that says, ‘We would like to encourage more diversity of professional services,’ [has] a directory of certified or available people that is up to date, [and] that it has correct contact information that is readily accessible.” [#I-65]

A number of interviewees commented on available business assistance and training opportunities in Colorado, and any gaps. Responses include:

- While interviewed, an African American part owner of a DBE/MBE/WBE construction-related firm indicated that cities recently started vamping up small business resources. Even following resource guidelines, he commented, “You can’t get any results ... they’re just pointing us to ‘go here and register here,’ ‘go here and get this sales tax certificate,’ or ‘go here and you can get top-of-the-line equipment for your field.’ But there is no actual real ‘live help’ in there It’s easy to get a business certificate but once you get that you’re back at square zero.” [#I-08]
- The Hispanic owner of a formerly certified SDV construction-related firm reported, “I don’t remember the exact course it was at the Small Business Development Center (SBDC) but I thought that was a great program. I’ve been back and helped them grade one of the projects, which was fun.” He added, “I think it was called ‘Leading Edge’” and he recommended it for young entrepreneurs. [#I-30]
- A Hispanic American partial owner of a professional services firm reported, “We did take advantage of some of the SBA trainings they had It was helpful, they gave us the right direction and got our profile set up.” [#I-76]
- Regarding business assistance programs, the white part owner of a WBE/ESB professional services firm reported that he has experience with CDOT’s business assistance programs. He commented, “CDOT has programs to help us win business and understand the CDOT system and whatnot I still haven’t won any work, but I’ve taken advantage of the programs They are highly informative.” [#I-36]

- An African American female representative of a minority representation industry association reported, “I try to refer folks over to the ‘The Commons’ where they have classes. Making a commitment to furthering education is a key factor to success. I try to keep a list of what is being offered. These are outstanding opportunities to learn the basics. There is a lot of prework that you need to do, and you need to take full advantage of all the opportunities to help these new small businesses.” [#TO-02]

The same association representative added that “it is very important for them to understand what their contracts are” and that they should seek assistance from municipalities for furthering their education on starting their own businesses. She stated, “Business assistance programs are absolutely necessary to furthering the success of these small businesses.” [#TO-02]

- An African American female representative of a minority chamber reported that members obtaining additional training and assistance “not with the state but from other entities, the city, Denver Public Schools (DPS), Regional Transportation District (RTD), those entities.” [#TO-04]
- A representative of a state agency indicated that a state-sponsored program that gradually trained small businesses on how to work with public entities would benefit HUB businesses and small businesses in general. [#FG-03b]

For some, financial and bonding assistance is missing in Colorado. For instance:

- An African American owner of a DBE, SDVOSB construction-related firm reported that he was upset that the Veterans Affairs (VA) does not offer financial assistance. [#I-09]
- When asked about experience with bonding programs, a Hispanic American male partial owner of an MBE/SBE/DBE construction-related firm reported, “All the bonding assistance programs I’ve seen really aren’t much bonding assistance. It’s like, ‘We’ll help you fill out the forms,’ but at the end of the day the underwriting is the same as it is in the private sector.” [#I-67]
- The representative of a state program reported that CDOT has a bonding assistance program to help subcontractors, but commented, “We’re still trying to get people into that program to use it.” [#FG-01f]

Some business owners gave other insights on business assistance programs. Examples include:

- “I guess that all these programs that the state is putting [in place are] working, but not for us,” reported a white female owner of a professional services firm. [#I-57]

- A Hispanic American male representative of a minority chamber reported, “I think everything the state is doing is meaningful and I would say pour resources into that side. I really think that you have some great minds I think it’s kind of this idea of thinking, ‘Why more resources?’ Well, because based upon our projected population growth ... we have \$1.7 trillion in buying power from the Hispanic population Now, the Hispanic buying power is larger than the entire Canadian economy It’s often referred to as a ‘country within a country’ Colorado is the eighth most populated Hispanic state There is a very, very strong argument based upon ... population growth that Hispanics are going to be such an intrinsic part of our future concern, our future workforce and our future business owners I think thinking about how we invest today to help support that is so paramount in terms of helping to think about our long-term economic development and our economic growth in the future.” [#TO-12]

Some interviewees have little or no knowledge or experience with any business assistance programs in Colorado. [e.g., #I-23, #I-25, #I-26, #I-38, #I-42, #I-52, #TO-05a] For example, the white female part owner of a WBE services firm reported, “I attended a school the City put on through Denver Public Schools, but that is the only training I have attended I just haven’t really heard of other programs.” [#I-24]

Certification, advantages and disadvantages. Interviewees gave insights on certification programs currently available to certain business groups in Colorado, as well as through the Small Business Administration.

Most agreed that certifications are useful, but often difficult to obtain. Comments include:

- The white male representative of an industry association reported, “I don’t know what the disadvantages would be of being certified, obviously you’re going to spend a little more time away from your business and studying and gaining that certification, but you’re making a business decision that this will help grow my business or will help me be better at my business which ultimately will pay dividends in the long run” [#TO-10]
- According to an Asian American owner an SBE/ESB/DBE/MWBE professional services firm, certifications with CDOT, the City of Denver and technical certification are required to do the projects. He remarked that there are “huge advantages” to being certified because primes will include you in the project because of the point system. [#I-03]
- The white owner of an ESB professional services firm reported, “We’ve been [prequalified] for a long time with CDOT, we got ESB certification two years ago. It wasn’t too cumbersome I think getting [prequalified] and certified as ESB side, [it] wasn’t too difficult. I do think the DBE process is ... [according to some of my friends] not worth it I’d look harder at what that process is, just to see if there’s a way to make it easier.” [#I-34]

- “I am familiar with DBE That’s why we made my wife a 51 percent owner of the company. In case she ever started doing work for us, it would qualify us as a DBE I am a veteran myself, so we explored that, but it was actually more beneficial for us to make it more woman-owned I do qualify as an emerging small business under CDOT’s ESB program too,” commented the white part owner of a WBE/ESB professional services firm. He added that getting the certification is easy, fair and that it does have advantages and value. [#I-36]
- An African American female representative of a minority representation industry association reported, “I don’t know of certification agencies ... but I do process applications for certifications. It can be a daunting task because a lot of people don’t understand [certain procedures].” She added, “[The process] could be shorter I don’t think [the process] should take two to three months.” She further commented that there should be no fee. [#TO-02]
- Regarding the certification process, an Asian American male owner of a professional services firm commented, “It was torture. [Certification] took me over a year with over 300 pages of documentation.” [#I-05]
- A Hispanic American male partial owner of an MBE/SBE/DBE construction-related firm reported that in the past when the firm struggled, they lost credibility. He explained that when they didn’t have the certification, it was really difficult to convince primes that they were prepared, capable and worthy of opportunities. [#I-67]
- “The State and the City puts out trainings on how to become certified, so I believe that most of our members have gone through certification by the state or the city,” commented a Hispanic American female representative of a minority representation industry association. She added, “[Certification] initially is hard, but if you want to become a successful business or grow you need to put into it the time and the effort ... and then the renewal process is not as cumbersome” [#TO-03]
- An African American female representative of a minority chamber reported that the knowledge she has on certification is from entities out of the State, like RTD and DPS, which she reported have excellent programs. She said the City is initiating a program that should be more accurate in helping small Black businesses get certified. She commented, “It is easy to become certified, but it is not necessarily easy to get work once you’re certified.” [#TO-04]

Some reported the need to better link certification to actual work. “There is nothing linking certification to getting work There needs to be that link,” remarked the white female representative of a minority chamber. She suggested that newly certified firms be put in contact with an agency that would provide a work opportunity to them. [#TO-07]

Some gave insights on certification processes that were “daunting” or invasive. Interviewees discussed their perception of DBE and other certifications. Some reported that challenges exist while others reported that the process was easy. For example:

- The white female owner of a professional services firm reported that the certification process for the SBA is not very clear and it is a bit daunting. She stated, “It’s not really clear. But I reached to another colleague of mine that went through the process as well. I have called a couple times just when I was looking for things and the folks were really very helpful. Part of it is my fault because I want to wait and figure it out.” [#I-44]
- The white female owner of a professional services firm reported that she has looked into becoming certified as a woman-owned business in the past but added that the process does not seem very intuitive. [#I-60]
- When interviewed, the white male owner of an ESB professional services firm reported knowing of individuals who wanted to set up their firm as a DBE, but ultimately decided against it because of the certification process and requirements. [#I-34]
- A white female representative of a construction-related firm reported that that the firm has a small business certification. She added that the certification process can be complicated based on experiences she had while helping a sub register as a women-owned firm. [#I-39]
- When interviewed, the representative of a minority chamber reported that it can also be an extensive process. He said, “I was kind of shocked. I had to provide affidavits from people ... that I am a known homosexual ... to validate that I am a gay-owned business It was crazy.” [#TO-09a]

Most interviewees indicated the need for a streamlined certification process, as well as unified certifications. [e.g., #I-02, #I-46, #I-61] For example:

- One white female representative of an industry association reported that “more handholding and coaching is good, but ultimately ... the amount of paperwork and the cost and the hoops that have to be jumped through to get that certification [should be decreased].” [#TO-08]
- The African American female owner of a professional services firm stressed the administrative burden from the certification process, which is especially challenging for small firms. She suggested additional resources for assisting small firms in the certification process. [#I-59]
- The Asian American owner an MBE/DBE professional services firm reported that it would be beneficial if the state would adopt the unified [certification] system. He also added that “getting the disparity study was huge.” [#I-06]

- Regarding the certification processes with different agencies, a Hispanic American partial owner of an MBE/SBE/DBE construction-related firm reported that all processes were relatively similar. He added, “There’s a lot of redundancy [with the application processes].” [#I-67]

When asked what recommendations he must improve the certification process, the same business owner reported, “Find a way to latch on and mirror how the City and County of Denver does theirs. It’s good, it’s true and tested, it’s electronic.” [#I-67]

- The white male representative of an industry association reported, “Each additional place you have to get registered is more time and expense for the firm that’s looking to get certified, and then the more different certifying agencies there are, the bigger opportunity that there could be some confusion for either the certified sub, or the prime contractor who’s trying to satisfy a goal” [#TO-06]

The same association representative continued, “I’ve heard, ‘We thought they were going to count because they’re certified here, but they weren’t certified over there,’ so the less certifying programs out there, the less of an opportunity for that type of confusion.” [#TO-06]

A number of business owners indicated that certification could be the pipeline for work as COVID-19 progresses. Examples include:

- Discussing the long-term effects of Covid-19, the Native American owner of a DBE construction-related firm commented, “I think this pushes us more toward the type of projects where we can utilize our certifications.” [#I-07]
- When interviewed, the Asian American female owner of a DBE professional services firm commented that the MWBE program will help her business weather the pandemic while other firms her size will likely not survive. [#I-10]

The same business owner added, “I’m going along as planned I think because of the MWBE program I suspect I will be getting more requests All the federal funding will start to kick in The last recession ... definitely the MWBE program helps because a lot of my ... friends closed up shop and changed careers ... with the larger [professional service] firms, they had to maybe do a lot of layoffs, but they still acquired government projects, which required MWBE participants, which meant I was still busy.” [#I-10]

Two representatives of a minority chamber reported that not having the LGBT certification recognized within the State of Colorado can be a disadvantage for businesses owned by members of the LGBT community. [#TO-09a, #TO-09b]

F. Recommendations for the State of Colorado and Other Public Agencies

Some suggestions for improvement to state procurement practices are reported in Part C of this appendix. In this part of the appendix, recommendations for how to begin to level the playing field for HUBs follows. Topics include:

- Suggestions to address barriers for HUBS;
- What the State of Colorado is doing to level the playing field;
- Any other insights, feedback or recommendations for the State of Colorado; and
- Input on the 2020 State of Colorado Disparity Study.

Suggestions to address barriers for HUBS. Business owners and representatives and trade association representatives suggested how the State of Colorado can address barriers and other disadvantages for HUBs in the marketplace.

Interviewees provided a wide range of recommendations to address barriers that certified firms and other small businesses face in the Colorado marketplace. Comments include:

- “It would be nice if they had a website that you could go to see what the available opportunities are for the state of the city and some information on how to get on to their bid list ... just generic details on what would be required,” commented the owner of a professional services firm. [#I-23]
- The white female representative of an industry association reported, “I would definitely like to see more of the best-value contracts that have in there some requirement for some percentage of the vendors to be minority-owned, or businesses owned by historically disadvantaged people” [#TO-08]

The same association representative went on to say, “People who are directly impacted by inequities are the ones who have the best solutions” [#TO-08]

- A representative of a state agency indicated that if public entities were to include more “on call” or “as needed” contracts, it would benefit smaller firms. He later added, “There’s no reason you can’t bring subconsultants on [to] any team.” He said this is something that could “be implemented at any time, easily.” [#FG-02d]
- The Asian American female owner of a DBE professional services firm suggested increasing contract requirements for buying local products and American-made goods and supplies. [#I-10]

The same business owner recommended a new RFP scoring point to incentivize working relationships with HUBs outside of contracts with explicit goals. She commented, “Maybe a new scoring point to maintain these DBEs to get another point for showing previous experience working with DBEs outside of the requirement.” [#I-10]

- A representative of a state agency reported that it's important to focus on inclusivity. He commented, "Our focus ... should be on all small businesses, regardless of race, gender" He continued, "The thing I've heard from people is [that] people don't like wearing labels. They should want to compete for state business." [#FG-03b]

One focus group participant indicated that public agencies should improve their knowledge and understanding of business practices. The representative of an engineering-related trade association stated, "What I wish for the [public] agencies to understand is business They don't understand the complications of so many different aspects." [#FG-04b]

She went on to say that she is aware of some large firms that had to notify an agency that their contract language was non-insurable They have to be true partners in understanding the business side, and not give me the excuse of, 'Well, that's the price of doing business.' That's ... like nails on a chalkboard to me." [#FG-04b]

What the State of Colorado is doing to level the playing field. Business owners and representatives and trade association representatives discussed how State of Colorado is doing regarding leveling the playing field.

Some indicated that the state is not doing nearly enough to level the playing field for HUBs. Comments follow:

- An African American female partial owner of a professional services firm reported, "There's nothing extra they're doing I think it is kind of a minimum expectation I haven't gotten the message that they're really wanting and focusing on getting women- and minority- and LGBTQ [-owned firms involved]. [Not] at the moment anyway." [#I-51]
- Commenting on the State, a Hispanic American partial owner of an MBE/SBE/DBE construction-related firm reported that he knows of no stated requirements or goals. He noted, "They're probably making the right public statements but there's no 'teeth.' If I get a state contract, I know that there's no requirement for any kind of participation ... they're not doing much." [#I-67]
- An African American female representative of a minority chamber reported, "The State [of Colorado] is way behind other entities such as the City of Denver." [#TO-04]
- The white male owner of a construction-related firm and member of the LGBT community reported, "They are doing nothing for the LGBT community." [#I-79]

Many interviewees reported on what is being done well in Colorado to support and encourage development of HUBs. [e.g., #FG-02e, #I-02, #I-04, #I-09, #I-27, I-33, #I-36, #I-41, #I-61]

Comments include:

- The white representative of a chamber of commerce commented, “I think the Governor is great example of a professional image, he’s a gay gentleman. I think just that small effort in the State of Colorado can go a long way and it opens up doors to other government agencies ... more people in leadership roles from a diverse population can always go a long way.” [#TO-01]
- One focus group participant, a representative of a state agency, reported that the civil rights program has implemented “some really interesting ... great things.” She continued, “I think we’ve got a really good, strong base right now ... [and] really great results so far.” [#FG-02a]
- Another focus group participant, a representative of a state program, reported that CDOT has developed “a pretty robust” ESB program. She continued, “In doing so, [CDOT has] put some things in place that have really worked, [such as] prompt pay. There is a prompt pay piece on professional services [contracts] where they pay within 90 days regardless of when the prime is actually paid.” She added that small businesses are also “allocated points” in the qualifications-based selection to “kind of level that playing field a little bit.” [#FG-02h]

The same program representative said that CDOT also does well to include its “tiered” on-call contracts and restricted contracts. She suggested that the state borrow these programmatic aspects and “apply it to the state contracting side of it because the foundation is already there.” [#FG-02h]

She added, “It would be less confusing for contractors if it was somewhat consistent.” She acknowledged that some things would have to be “figured on” on the compliance side of things, but noted, “Overall, the closer that it can be to some of the things that [already] exist ... to make it easier for contractors [and] the agency to ... implement, would be good.” [#FG-02h]

- Commenting that the CDOT DBE program “is well-established,” the white male representative of an industry association indicated, “... there have definitely been success stories, we have a handful of members that started out pretty small, and were able to grow ... I’ve noticed as a couple of the firms that have graduated.” [#TO-06]
- The Asian American male owner an MBE/DBE professional services firm reported that Connect2DOT that reaches out to DBEs is doing a good job encouraging firms to be certified. [#I-06]
- While interviewed, a Native American owner of a DBE construction-related firm reported that the Connect2DOT Program is a good program. He also reported that CDOT does a great job conducting site visits to make sure that a business owner is being honest about who they are. [#I-07]

- The white owner of an ESB professional services firm reported that he knows of recent projects where small firms won CDOT work. He went on to say that he believes CDOT has been trying to unbundle projects into smaller contracts. [#I-34]
- The Asian American female owner of a DBE professional services firm lauded the City and County of Denver for its participation goals. [#I-10]
- A Hispanic owner of a formerly certified SDV construction-related firm reported that there is an advantage of having bids listed online for people to see all the opportunities. He added, “I have found it very helpful, because some entities don’t have that kind of platform.” [#I-30]
- While interviewed, a female representative of a minority business organization reported, “The only effort that I have seen is in terms of achieving the 3 percent goal of growth for veteran-owned business. That is the only effort I can site for this time.” [#TO-05a]
- The male representative of a minority advocacy organization reported, “One of the things that I’ve seen is a lot more outreach around when these processes happen, so I think there’s a lot more transparency about open opportunity I’ve also been seeing a lot more partnerships again with some of those trusted community partners to really get the word out ... seeing government value the credibility of their nonprofit members.” [#TO-11]

Interviewees discussed how the State of Colorado-sponsored programs or practices could be improved or changed. Comments include:

- When asked how the state can do things better when it comes to bids, a Hispanic owner of a formerly certified SDV construction-related firm reported, “Basically what they need to do is take out the [requirement of] additional parts and service, when they just need a unit.” [#I-30]

The same business owner went on to say, “They should bid-out the maintenance and when that is completed, they need to price shop the deficiencies. And go through maybe another bid process for that.” [#I-30]

- An African American male owner of a DBE/SBA professional services firm reported, “They are so careless, and they don’t respond There has to be accountability, they are just sitting there doing nothing ... wasting time” [#I-77]

- A representative of a state agency suggested that State of Colorado provide resources to agencies to advertise and make known state-sponsored programs. He noted, “As far as other more diverse groups [out there] ... somehow they need to know that we’re out there looking for contractors on large and small projects so that they can get their foot in the door.” He described their procurement process as “very appropriate and even-handed” for contractors. [#FG-01b]

The same agency representative added, “If [the State] can provide more resources so we can get the word out better, we’re more than interested in involving all different makes and sizes, and levels of experience of contractors.” He concluded, “We lack the resources to be overly proactive about making these things happen, internally.” [#FG-01b]

- The representative of a public entity indicated that it might be difficult for state agencies to tailor the procurement process for small businesses because the state works for “a multitude of businesses in all types of different areas.” He added that efficiency and managing risk are important to the state when procuring services. He went on to say that contract requirements for small businesses probably need to be “tiered” better to better fit those firms. [#FG-04d]
- Another focus group participant, the representative of a public entity, commented that the state tries to get rid of “as many roadblocks as possible” when it comes to procurement for small businesses. She commented, “A lot of the times we have to go through multiple steps of approval, because a lot of [the] requirements ... are statutory-based or rule-based [and] have to go [through] our risk department or ... simple contracts unit, [or] office of information technology.” [#FG-04e]

Any other insights, feedback or recommendations for the State of Colorado. Several public agency representatives indicated a need for a statewide certified small business directory. For example:

- A representative of a state agency said that the greatest opportunity for small businesses is in “lower-dollar” purchases because they “don’t have to compete if it’s under \$25,000.” He explained, “[You] can go directly to the company and [you] can do business with them.” He reported, however, that it’s an obstacle to find small businesses to work with, including minority- and women-owned, because they don’t have a statewide list. [#FG-03b]

The same agency representative went on to say, “It would be awesome to go to the Minority Business Office and do a keyword search for the type of business I’m looking for, and maybe even see reviews and what other state agencies are saying.” He added that a list would help give the businesses “more presence and more leverage.” He indicated that this would benefit both State of Colorado and minority businesses because it would highlight firms that perform quality work. [#FG-03b]

- Another focus group participant, a representative of a state agency, said that a statewide “greater directory” would need to have a way to validate listed firms’ certifications. He commented, “That’s always a concern. If businesses are self-identifying, how legit is it?” [#FG-03b]
- A Hispanic American female representative of a minority representation industry association reported a need for “accountability with the prime contractors” to meet contract goals. [#TO-03]
- Regarding suggestions for how any or all of the participating entities can improve, a female representative of a minority business organization reported, “There are a lot of different things we can do. Specifically, for minority- and women-owned business. The DPA can implement self-authentication from those types of businesses ...when they signed up to be a vendor, they can self-identify and it would be easier for the DPA to determine how to communicate with these communities and make sure they are aware of these opportunities to arise This kind of authorization needs to be a thing.” [#TO-05a]

The same organization representative added, “The idea of creating contracts that are more attainable for smaller companies to participate in and creating more opportunities [for small businesses] to team up. Breaking up into smaller contracts would be a huge win-win for everybody.” [#TO-05a]

She also commented, “Creating a lot more knowledge about how they can have a price agreement with the State of Colorado [would be beneficial]. It is seen as something extremely complicated [to small companies] and seen as given to companies that are huge.” She added, “Smaller businesses may have access to it but don’t know where to start to participate.” [#TO-05a]

- “When it’s a build-design project, CDOT is not posting if they have received estimates ... that’s no help for small businesses. Before, we used to go put the project number and the pay estimates show ... but they are not doing that anymore, especially on those bigger projects where small businesses have no access or control,” remarked a Hispanic American female part owner of an SBE/MWBE/DBE construction-related firm. [#I-14]
- “If you look at the federal definition of a small business, 500 or fewer employees, that’s pretty much 95 percent of my membership but there are small businesses that are much, much smaller than 500 employees, and largely they would tell you, ‘Get out of my way,’” reported the white male representative of an industry association. [#TO-10]

Many reported on the specifics of the State of Colorado procurement practices and compliance and indicated that they could be improved. Comments include:

- One focus group participant reported that procurement by the State Buildings Program includes an interview component. He suggested that more state entities implement interviews as part of procurement processes. He commented, “Everybody in the business world benefits by presenting to other people and showing what their capabilities are.” [#FG-02d]

Another focus group participant, a representative of a state agency, said that there should be a way to reach and verify HUBs more effectively. He added that this would give the HUB program more “legitimacy.” He indicated that the HUB program should offer clients a streamlined way of sending bid opportunity notifications to HUB businesses. [#FG-03b]

- Another focus group participant, the representative of a public entity, indicated that the state could better track its spending on programs that benefit small, minority- and women-owned firms in order to monitor how it is supporting those firms. He noted that in his division does not have this reporting. He indicated that a statewide program that monitors and reports this data would be beneficial. [#FG-04d]

Input on the 2020 State of Colorado Disparity Study. A number of interviewees indicated that the 2020 State of Colorado Disparity Study further demonstrates the State of Colorado’s interest in supporting the development of minority- and women-owned firms and other small businesses. Comments include:

- An African American female representative of a minority representation industry association reported, “I’m encouraged that the State of Colorado is doing this disparity study because there have been years that people asked for it and it didn’t happen. We have got to be able to provide resources for our small businesses ... hopefully the state can make those kinds of things available.” [#TO-02]
- A male representative of a minority chamber reported, “Just you asking to have this call is huge! I’ve been waiting for this for 10 years, so no, this is huge! Huge kudos. Very excited about this and grateful that it’s on your radar.” [#TO-09a]
- The white female representative of a minority chamber stated that she is glad that the Governor has chosen to do this disparity study. Now she reported the need for action, “Action in the right places.” [#TO-07]

APPENDIX K.

Business Assistance Programs in Colorado

Local and state agencies, not-for-profit organizations, membership organizations and other groups operate a broad range of assistance programs available to businesses in Colorado. Understanding these programs is important when evaluating opportunities for efforts by the State. Although the list of programs discussed in Appendix K is not exhaustive, the initiatives described here comprise some of the most important resources for diverse businesses and other small companies in Colorado. Appendix K is organized into two parts:

- A. Federal government and other national programs; and
- B. State and local government, statewide membership organization, not-for-profit and private sector initiatives.

A. Federal Government and Other National Program Examples

A summary of federal program examples follows.

Federal ACDBE Program. Commercial airports receiving FAA funds are required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to certain airport concessions activities. Socially and economically disadvantaged firms can be certified as ACDBEs. Airports sometimes set goals for participation of ACDBEs in individual airport concessions agreements.

The ACDBE Program applies to commercial service airports with 10,000 or more annual enplanements. Non-primary airports, non-commercial service airports, general aviation airports, reliever airports, or any other airport that does not have scheduled commercial service are not required to have an ACDBE program.¹

Federal DBE Program. The U.S. Department of Transportation requires state and local governments that receive funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal DBE Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation (USDOT).² The Federal DBE Program applies to USDOT-funded contracts that Colorado Department of Transportation (CDOT) awards directly or through a local agency recipient.

¹ 49 CFR Section 23.21.

² See <https://www.fhwa.dot.gov/civilrights/programs/dbess/>

To be certified as a DBE, a firm must be socially and economically disadvantaged. Revenue limits, personal net worth limits and other restrictions apply. Most DBEs are minority- or women-owned firms, but white male-owned firms that can demonstrate social and economic disadvantage can be certified as DBEs as well.³

Under the Federal DBE Program, a public agency can set a DBE goal on a contract. Prime contractors must either include a level of DBE participation in their bid that meets the goal for the contract or show good faith efforts to do so.

The State of Colorado has a Unified Certification Program (UCP) that was established to facilitate statewide DBE certification. CDOT and the City and County of Denver are the two certifying agencies for the Colorado UCP. Denver is the only certifying agency for Denver International Airport (DIA) Airport Concession DBEs (ACDBEs).

Historically Underutilized Business Zone (HUBZone) Program. The HUBZone program allows federal contract set-asides for small businesses in economically depressed communities. Eligibility is limited to small businesses at least 51 percent owned and controlled by U.S. citizens, located in a qualified HUBZone, where at least 35 percent of employees are residing in that HUBZone.⁴

Internal Revenue Service (IRS) Small Business and Self-Employed Tax Center. The IRS provides a one-stop assistance center for small businesses or self-employed entrepreneurs. This program provides resources for taxpayers filing as self-employers or small businesses with assets under \$10 million. It includes information on independent contractors, preparing and filing taxes, online learning workshops, and the stages of owning a business.⁵

Minority Business Development Agency (MBDA). Part of the U.S. Department of Commerce, MBDA provides technical assistance and resources related to business financing, access to capital, contract opportunities and new opportunities for minority-owned businesses in the United States.⁶

National Minority Supplier Development Council (NMSDC). NMSDC is a corporate member organization focused on increasing business opportunities for certified minority-owned businesses. It operates the Business Consortium Fund, a nonprofit business development program, which offers financing programs and business advisory services for its members.⁷

Operation Hope Small-Business Empowerment Program. The Operation Hope program assists aspiring entrepreneurs in low-wealth neighborhoods. The program combines business training and financial counseling with access to small business financing options. Participants complete a 12-week training program, plus workshops on business financing, credit and money management.⁸

³ See <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise>

⁴ See <https://www.certify.sba.gov/am-i-eligible>

⁵ See <https://www.irs.gov/businesses/small-businesses-self-employed>

⁶ See <https://www.mbda.gov/>

⁷ See <https://www.nmsdc.org/>

⁸ See <https://operationhope.org/small-business-development/>

Small Business Development Centers (SBDCs). U.S. Small Business Administration financially supports SBDCs throughout the country to provide small business training and business counseling to small business owners and prospective entrepreneurs. There are 14 full-time centers and more than 70 part-time satellite centers located throughout the state.⁹

Small Business Innovation Research (SBIR). SBIR program solicitations are issued by eleven Federal agencies, including the Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Transportation, Environmental Protection Agency, National Aeronautics and Space Administration, and the National Science Foundation.¹⁰

Small Business Technology Transfer (STTR). STTR is designed to stimulate technological innovation and provide opportunities for small businesses in the field of research and development in partnership with federal agencies. Currently small businesses collaborate with agencies such as the Department of Defense, the Department of Energy, the Department of Health and Human Services, the National Aeronautics and Space Administration and the National Science Foundation in joint-venture opportunities throughout the nation.

U.S. Chamber Small Business Division. The Small Business Division offers free tools such as the Small Business Office Playbook and helps with selecting offices, cost control and choosing suppliers.¹¹

U.S. Department of Defense (DoD). The U.S. Department of Defense (DoD) aids small businesses interested in participating in DoD contracts. It also applies incentives for using small businesses, American Indian-owned businesses, women-owned small businesses and firms located in historically underutilized business zones (HUBzones). Certain prime contracts are required to establish small business subcontracting programs.

DoD also operates a mentor-protégé program that matches large firms with small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses and other small businesses. Mentors are reimbursed for mentoring expenses or are provided credit toward their small disadvantaged business subcontracting goals.

United States Department of Housing and Urban Development (HUD). HUD is the federal department that administers Community Development Block Grants (CDBG funds), certain federal housing programs and related programs. State and local governments that receive money from HUD must comply with HUD requirements regarding minority- and women-owned business participation in HUD-funded contracts, as well as participation of project-area residents in those contracts.

⁹ See <https://www.coloradosbdc.org/who-we-are/locations/>

¹⁰ See <https://www.sbir.gov/>

¹¹ See <https://www.uschamber.com/members/small-business>

U.S. Department of Transportation Office of Small and Disadvantaged Business Utilization (OSDBU). The OSDBU offers a range of programs and resources to assist small and disadvantaged businesses. Initiatives include a mentor-protégé program, a bonding assistance program, the Women and Girls in Transportation Initiative and a short-term lending program. OSDBU partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond ready. This program aims to help businesses grow and build bonding capacity.¹²

U.S. Department of Veterans Affairs, Office of Small and Disadvantaged Business Utilization (OSDBU). The U.S. Department of Veterans Affairs OSDBU assists veteran-owned businesses through the business verification and procurement assistance program and the VA Small Business Mentor-Protégé Program.¹³

U.S. Economic Development Administration (EDA). U.S. EDA works directly with local communities and regions to advance economic development initiatives based on local requirements. The U.S. EDA provides grants to businesses for planning, technical assistance and infrastructure construction.¹⁴

U.S. Environmental Protection Agency (EPA) Disadvantaged Business Enterprise (DBE) Program. The EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA has certain requirements for the EPA Disadvantaged Business Enterprise (DBE) Program regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-funded contracts for construction, equipment, services and supplies.¹⁵

U.S. Small Business Administration (SBA) Office of Veterans Business Development. U.S. SBA Office of Veterans Business Development provides programs related to business training, counseling and assistance. It also oversees federal procurement programs for veteran- and service-disabled veteran-owned small businesses.¹⁶

U.S. Small Business Administration (SBA) 7(a) Loan Program. The SBA 7(a) Program provides small businesses access to up to \$5 million in loans to fund startup costs, buy equipment, purchase new land, repair existing capital and expand an existing business. To be considered eligible for the SBA 7(a) Loan Program, businesses must meet SBA's size standards pertaining to the annual receipts or number of employees for the company.¹⁷

¹² See <https://www.transportation.gov/content/office-small-and-disadvantaged-business-utilization>

¹³ See <https://www.va.gov/osdbu/>

¹⁴ See <https://www.eda.gov/>

¹⁵ See https://www.epa.gov/sites/production/files/2015-09/documents/tues_atlanta_5_1015_henderson.pdf

¹⁶ See <https://www.sba.gov/offices/headquarters/ovbd>

¹⁷ See <https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans>

U.S. Small Business Administration (SBA) 8(a) Business Development Program. The SBA 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. It offers a broad scope of assistance to firms certified under the program (companies that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals).¹⁸ Program participants can compete for set-aside and sole-source federal contracts.

Woman-Owned Small Business/Economically Disadvantaged Woman-Owned Small Business (WOSB/EDWOSB) Federal Contracting Program. The WOSB/EDWOSB program administered by the U.S. SBA assists small businesses owned and controlled by one or more economically disadvantaged women to participate in the federal procurement process within industries where women-owned small businesses are under-represented. To be a WOSB, a woman-owned small business in selected industries¹⁹ must be at least 51 percent owned and controlled by women who are U.S. citizens and be a small business as defined by the U.S. SBA.

To be eligible as an EDWOSB, the business must meet the criteria of the WOSB program and each owner must have less than \$750,000 in personal net worth, \$350,000 or less in adjusted gross income averaged over the previous three years, and \$6 million or less in personal assets.²⁰

B. State and Local Government, Statewide Membership Organization, Not-for-Profit and Private Sector Initiatives

Examples of programs provided by Colorado-based organizations (or local chapters of national organizations) follow.

ACCESSColorado. ACCESSColorado is the supplier outreach program at the State Purchasing & Contracts Office. The program works with suppliers wanting do work with State agencies and local governments. Together with the Minority Business Office and other State agencies, ACCESSColorado hosts the Advance Colorado Procurement Expo, giving suppliers an opportunity to meet one on one with representatives from the State and local governments.²¹

American Council of Engineering Companies of Colorado (ACEC Colorado). ACEC Colorado is a business association for consulting engineering firms in Colorado. The association provides its membership with education and networking events and access to business and career resources specifically tailored to the consulting engineering industry.

Asian Chamber of Commerce (ACC). The ACC is a Denver-based membership organization for Asian American-owned businesses in Colorado. ACC advocates for its members at the state and local levels and participates in delegations to other countries to promote international trade. The ACC also provides networking opportunities such as monthly events and lunch seminars.²²

¹⁸ See <https://www.sba.gov/category/business-groups/minority-owned>

¹⁹ See <https://www.sba.gov/document/support--qualifying-naics-women-owned-small-business-federal-contracting-program>

²⁰ See <https://www.certify.sba.gov/am-i-eligible>

²¹ See <https://www.colorado.gov/pacific/osc/access>

²² See <https://www.acccolorado.org>

Associated Builders and Contractors (ABC) Rocky Mountain Chapter. The Rocky Mountain Chapter of ABC provides leadership, safety education, workforce development and advocacy on behalf of its membership which includes firms within the construction industry. The Rocky Mountain Chapter is part of the national Associated Builders and Contractors organization and serves Colorado and Wyoming.

Associated General Contractors of Colorado (AGC of Colorado). The AGC of Colorado is a professional association for firms within the commercial building industry located in Denver, Colorado Springs, Fort Collins and the Mountain Range. It provides education programs, construction safety services, networking opportunities and advocacy for its members. Members are also members of the Associated General Contractors of America, the national organization.

Black Construction Group (BCG). The BCG is part of the Colorado Black Chamber of Commerce and is resource group for Colorado's African American owned businesses. It provides its members with resources for business development, education, advocacy, networking opportunities and access to other related resources for the African American construction business community.

Colorado Asian Chamber of Commerce. See Asian Chamber of Commerce.

Colorado Black Chamber of Commerce (CBCC). The CBCC provides management and technical assistance to African American-owned businesses. Assistance includes information on funding sources, seminars and workshops, and access to public sector and business leaders.

Colorado Chamber of Commerce. The Colorado Chamber of Commerce provides public policy advocacy for its members at the state and national level. Its membership consists of businesses throughout Colorado.

Colorado Contractors Association (CCA). The CCA is a professional association for infrastructure construction professionals that provides its membership with advocacy, education, training and networking opportunities.

Colorado Hispanic Chamber of Commerce (COHCC). The COHCC provides management and technical assistance to its membership. It provides access to information about capital resources, notification of bid opportunities, information about certification programs, procurement and educational workshops, media resources and a resource center, multi-cultural series and employment opportunities.²³

Colorado LGBTQ Chamber of Commerce. The Colorado LGBTQ Chamber of Commerce supports members of the LGBTQ business community with programs in personal and workforce development. It oversees the certified LGBT Business Enterprise (LGBTBE) program. Also, see LGBT-owned Business Enterprise (LGBTBE) Certification program.

Colorado Office of Economic Development & International Trade (OEDIT). OEDIT offers entrepreneurs and small businesses financial and technical assistance.

²³ See <https://www.hispanicchamberdenver.com/>

Colorado Procurement Technical Assistance Center (PTAC). PTAC provides free counseling for businesses that require procurement technical assistance to secure federal, state and local government contracts, a bid matching service, a mentor-protégé program, procurement workshops and advice on proposals. PTAC-staffed offices are located in Colorado Springs, Westminster, Golden, Aurora, Fort Collins, Pueblo and Grand Junction. Other locations, by appointment only, include Alamosa, Boulder, Durango, Loveland, Fort Morgan, Burlington and La Junta.

Colorado Small Business Development Center Network (CSBDC). CSBDC provides free consulting and no- or low-cost training programs to small businesses. The CSBDC helps businesses secure loans, increase sales, win government contracts, and obtain certifications. The CSBDC has access to information and resources from federal, state and local governments, the local education system and private sector that will assist small businesses.

Colorado Unified Certification Program (UCP). The Colorado UCP facilitates statewide Disadvantaged Business Enterprise (DBE) certification and eliminates the need for DBE applicants to obtain certification from multiple agencies. The Colorado Department of Transportation (CDOT) and the City and County of Denver (CCD) are the certifying agencies for the Colorado UCP. CCD is the only certifying agency for Denver International Airport (DIA) Airport Concession DBEs (ACDBEs).

Colorado Women’s Chamber of Commerce (CWCC). The CWCC provides management and technical assistance to women business owners. Assistance includes information on access to capital, business development, training, education and leadership programs.

Connect2DOT. Connect2DOT is a Colorado Department of Transportation program that provides free consulting, training, and networking opportunities for DBE, ESB, and other small business in the transportation and infrastructure industry. The program helps these businesses become more competitive and successful in bidding and contracting with CDOT and local agency recipients. CDOT has an interagency agreement with OEDIT to deliver program services in partnership with the Colorado SBDC Network across the state.

Connect2DOT works with CDOT Center for Procurement and Contract Services and the Minority Business Office to host the Day at the DOT, an open house where vendors can meet one-on-one with CDOT employees to learn how to sell goods or services to CDOT.²⁴

Defined Selection Pool program. The Defined Selection Pool program is race- and gender-neutral and allows certified Small Business Enterprise (SBE) companies to bid and compete as prime contractors on City and County of Denver construction and professional design contracts. A portion of these contracts are designated for exclusive bidding by SBEs.²⁵

²⁴ See <http://www.connect2dot.org/> and <https://www.codot.gov/business/procurement-and-contract-services>

²⁵ See <https://www.denvergov.org/content/denvergov/en/denver-office-of-economic-development/do-business-with-denver/kinds-of-certification.html>

Denver MBDA Business Center. The Denver MBDA Business Center is operated by the Mountain Plains Minority Supplier Development Council (MSDC). The business center provides management and technical assistance in business consulting, matchmaking, contract opportunity sourcing, financial sourcing and access to international markets. Also, see Mountain Plains Minority Supplier Development Council.

Disability Set Aside program. The State has a Disability Set Aside program that encourages purchases from non-profit agencies employing persons with severe disabilities. (C.R.S. 24-103-801).

Emerging Business Enterprise Program (EBE). The EBE program is a race- and gender-neutral program administered by Denver Economic Development & Opportunity (DEDO). The program sets aside construction and professional services projects for competition among EBE-certified companies. Construction firms with average annual gross revenues less than \$3 million and professional services firms with average gross revenues less than \$1 million are eligible for certification as long as 51 percent of the ownership is persons who do not exceed the \$1.32 million personal net worth limit (excluding primary personal residence and ownership interest in the company).

Emerging Small Business Program (ESB). The ESB program is for eligible small, for-profit businesses that provide construction, design or research service on Colorado Department of Transportation (CDOT) contracts. It is managed by the CDOT Civil Rights & Business Resource Center as a race- and gender-neutral small business program. This program helps small businesses obtain work on CDOT state-funded construction, professional service, and research contracts. ESB certification applies only to CDOT projects and is not transferable to or used by other agencies. ESB participants are eligible for benefits including incentives for primes to utilize ESB subcontractors/subconsultants, projects restricted for bidding only by ESB firms, scholarships, CDOT Mentor-Protégé program, CDOT Bond Assistance Program, company listings in the CDOT public directory and other support services. It is available to firms already certified as MBE/SBE/SBEC/WBE.²⁶

Hispanic Chamber of Commerce of Metro Denver. See Colorado Hispanic Chamber of Commerce.

Hispanic Contractors of Colorado. HCC is a membership organization for HUB contractors in Colorado that provides advocacy, education and networking. HCC also sponsors the non-profit Contractor Academy, which provides training and leadership development programs for small businesses in the construction industry.

LGBT-owned Business Enterprise (LGBTBE) Certification program. The National Gay & Lesbian Chamber of Commerce administers the state level LGBT-owned Business Enterprise Certification program for businesses formed and headquartered in the U.S. Certification is for businesses 51 percent owned and controlled by LGBT person(s). The business owner must either be a U.S. citizen or permanent resident who is not engaged in any non-LGBT business enterprise.²⁷ Also, see Colorado LGBTQ Chamber of Commerce.

²⁶ See <https://www.mbocolorado.com/types-of-certifications/listing/esb/>

²⁷ See <https://www.mbocolorado.com/types-of-certifications/listing/lgbt-owned-business-enterprise-certification/>

Minority Business Office (MBO). MBO is part of Colorado Office of Economic Development & International Trade (OEDIT) that helps businesses connect with resources available to minority-, veteran- or women-owned businesses. MBO offers complimentary consulting sessions in collaboration with Colorado SBDC and provides assistance with certification. In collaboration with *RFPprepared*, a Colorado based, women-owned company, MBO operates the Bid Advance Response program, a free six-month mentoring program designed to prepare small minority-owned businesses to win government contracts. The Office works with other State agencies to host the Advance Colorado Procurement Expo and Day at the DOT with the Colorado Department of Transportation and Connect2DOT.

Minority Women Business Enterprise (MWBE) program. The MWBE program provides small minority- or women-owned businesses the opportunity to compete for City and County of Denver contracts. To be eligible, businesses must be at least 51 percent owned and controlled by one or more socially and economically disadvantaged individual who is either a woman, Hispanic, Asian, African American or Native American. The owner's net worth is limited to less than \$1.32 million, which excludes a primary residence and ownership interest in the company applying for certification. The MWBE program is available through Denver Economic Development & Opportunity (DEDO) office. The MWBE program includes a contract goals program for certain projects as well as an MWBE Mentor-Protégé Pilot program for 2020.

Mountain Plains Minority Supplier Development Council (MSDC). The Mountain Plains MSDC is a regional affiliate of the National Minority Supplier Development Council (NMSDC) and serves MBEs in Colorado, Kansas, Western Missouri and Nebraska.²⁸ It certifies minority-owned businesses, provides educational programs and networking opportunities, and operates the Denver MBDA Business Center.²⁹ Also, see Denver MBDA Business Center.

Regional Transportation District (RTD) Small Business Enterprise (SBE) program. The RTD SBE is a race- and gender-neutral certification program for small businesses. Eligibility requires that the business' average annual gross receipts for the past 3 years not exceed \$23.98 million and that the business is owned by one or more persons whose personal net worth is less than \$1.32 million. This program is administered by the Small Business Office within the Regional Transportation Division's Civil Rights Division.³⁰

Rocky Mountain Indian Chamber of Commerce (RMICC). The RMICC provides training and community development programs that benefit businesses owned by American Indians. Training includes tax and business legislation workshops, entrepreneurial programs and technical assistance.³¹

SCORE. See Service Corps of Retired Executives.

²⁸ See <http://www.mpmsdc.org/overview/>

²⁹ See <http://www.mpmsdc.org/overview/>

³⁰ See <https://www.rtd-denver.com/business-center/dbesbe>

³¹ See <https://rmicc.org/>

Service Corps of Retired Executives (SCORE). The Service Corps of Retired Executives (SCORE) is a non-profit, volunteer-run organization that offers small business supportive services and business mentoring nationwide as a resource partner of the U.S. Small Business Administration (SBA). It provides technical assistance such as help with business plans, marketing, sales and financial forecasting. Colorado has SCORE chapters in Denver, Fort Collins, Steamboat Springs, Grand Junction, Monument, Leadville and Colorado Springs.

Small Business Enterprise (SBE) program. The SBE program is a race- and gender-neutral municipal program available through Denver Economic Development & Opportunity (DEDO) which allows certified small businesses to compete with similar small businesses for the City's construction-related projects and some covered goods and services. Certification requirements include revenue not exceeding U.S. SBA small business size standards (with a maximum of \$23.98 million) and owner personal net worth below \$1.32 million. See Defined Selection Pool.³²

Small Business Enterprise Concession (SBEC). The SBEC program is a race- and gender-neutral certification program offered through Denver Economic Development & Opportunity (DEDO) for small, for-profit airport concessions or suppliers of goods or services to concessions with average annual gross revenues less than \$7 million. It allows qualified Denver area small businesses an opportunity to compete as concessionaires to provide food, beverage and retail services at Denver International Airport.

West Central Small Business Transportation Resource Center (SBTRC). The West Central SBTRC is a USDOT OSDBU program that assists small, disadvantaged business in Colorado, Nebraska, South Dakota, Utah and Wyoming with building their capacity to bid on and perform on transportation projects and professional service procurements. It provides consulting, bonding assistance and opportunities to network with prime contractors.

Western Colorado Contractors Association (WCCA). WCCA is a professional association for infrastructure construction professionals located in the western slope of Colorado that provides its membership with education, training and networking opportunities.

Women's Business Enterprise Council–West (WBEC-West). WBEC-West is a private sector agency which locally administers the Women Business Enterprise National Council (WBENC) Certification program for independent businesses that are at least 51 percent owned and controlled by one or more women.³³ It provides access to a list of supplier diversity and procurement businesses and government entities that accept WBENC certification.

WBENC is the largest certifier of women-owned business in the U.S. and provides Women-Owned Small Business (WOSB) certification for the SBA WOSB Federal Contracting Program.³⁴ Also, see Woman-Owned Small Business/Economically Disadvantaged Woman-Owned Small Business (WOSB/EDWOSB) Program.

³² See <https://www.denvergov.org/content/denvergov/en/denver-office-of-economic-development/do-business-with-denver/kinds-of-certification.html>

³³ See <https://www.mbocolorado.com/types-of-certifications/listing/wbe/>

³⁴ See <https://www.wbenc.org/certification/>