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## **2017 MINNESOTA JOINT DISPARITY STUDY Minnesota Department of Administration Final Report**

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**FINAL REPORT  
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## EXECUTIVE SUMMARY

The 2017 Minnesota Joint Disparity Study examines whether there is a level playing field for minority- and women-owned firms in the Minnesota marketplace and in public procurement. Keen Independent Research LLC (Keen Independent) performed the study for the Minnesota Department of Administration (Admin) and eight other state and local government entities. Admin will use study results when making decisions about programs to assist minority- and women-owned companies and other small businesses. Admin last conducted a disparity study in 2009.<sup>1</sup>

Admin makes purchases for 88 business units in Minnesota state government.<sup>2</sup> It has operated the Targeted Group Business (TG) Program since the 1990s to address barriers in procurement. The TG Program includes minority- and women-owned businesses and companies owned by persons with physical disabilities. The study analyzes whether Admin's current programs are effective in eliminating any disparities in the utilization of minority- and women-owned businesses (MBEs and WBEs) in its contracts.

Admin operates parallel programs for businesses located in economically disadvantaged counties and firms owned by veterans (ED/VO Programs). The disparity study also analyzes marketplace conditions for veteran-owned businesses and companies owned by persons with disabilities.

This report was released as a draft for public comment on January 29, 2018. It has been expanded based on public input received through February 28, 2018. The Executive Summary includes:

- A. Background on the study;
- B. Disparity Study research activities;
- C. Quantitative and qualitative information for the Minnesota marketplace;
- D. Disparity analysis;
- E. Recommendations; and
- F. Public participation in the Disparity Study.

### A. Background on the Study

Admin periodically conducts disparity studies to determine whether there is sufficient need for programs that assist minority- and women-owned firms in its procurement.

**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 have minority business programs or any other initiatives benefitting businesses based on the race of their owners. Legal restrictions also apply

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<sup>1</sup> MGT of America, Inc. *State of Minnesota Joint Availability and Disparity Study, Minnesota Department of Administration*, October 22, 2009.

<sup>2</sup> The study for Admin does not include Minnesota Department of Transportation highway construction and engineering contracts, which are examined in a separate report. Minnesota State contracts are also examined in a separate report.

to programs for women-owned firms. Disparity studies help state and local governments determine whether programs are needed and supportable.

Even if a targeted business program does not consider race or gender, it can still be subject to legal challenge. However, such programs are more easily defended by the enacting jurisdiction. These types of programs include small business enterprise (SBE) programs and those that provide assistance to firms based on whether they are owned by veterans or by persons with disabilities. Although disparity studies typically do not examine these groups, the Minnesota Joint Disparity Study added analysis of marketplace conditions for businesses owned by veterans and persons with disabilities.

**Programs.** The TG/ED/VO Program applies to construction, professional services, goods and other services contracts. Certified businesses may receive up to a 6 percent price or evaluation preference when bidding on Admin procurements. Admin also sets TG/ED/VO contract goals on certain construction contracts. Based on Admin's review of the results of the 2009 disparity study, some minority groups have not been eligible for the program in certain industries.<sup>3</sup>

## **B. Disparity Study Research Activities**

The Keen Independent study team began work in summer 2016 and completed draft reports in late 2017. Local team members included Felton Financial Forensics, C J Petersen & Associates, LLC, Fondungallah & Kigham, and KLD Consulting. Team members from outside Minnesota were Holland & Knight, BBC Research & Consulting and Customer Research International.

**Department of Administration contracts and subcontracts.** Keen Independent examined payments Admin made to firms from July 1, 2011 through June 30, 2016. For construction, Keen Independent compiled information from Contractor Affidavits (IC134 Forms) that prime contractors and subcontractors submit to the Minnesota Department of Revenue.

In the Admin utilization analysis, Keen Independent included more than 76,010 procurements totaling \$3.1 billion over the study period. This does not encompass all State of Minnesota spending. For example, the study team excluded the types of purchases typically made from national markets (software and computers) as well as utilities, leases, insurance, payments to banks and small purchases. Also excluded were payments to not-for-profit organizations and public agencies and procurements from industries in Minnesota principally composed of those organizations (e.g., most type of health care and social services procurements).

**Relevant geographic market area.** About 80 percent of combined Admin procurement dollars went to firms with locations in Minnesota and two counties in Wisconsin (Pierce and St. Croix). This geographic area was the focus of the marketplace and availability analyses in the disparity study.

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<sup>3</sup> Based on the 2009 State Agencies Disparity Study, Asian American-owned firms do not count toward the TGB contract goals for construction projects, African American-owned firms do not count as underutilized businesses for professional services contracts, and African American-, American Indian- and Asian American-owned firms do not count as underutilized businesses for other services.

**Analysis of marketplace conditions.** The study team compiled and analyzed quantitative information about outcomes for minorities and women, and minority- and women-owned firms in the Minnesota marketplace. Keen Independent also researched conditions for firms owned by veterans and persons with disabilities.

The study team conducted in-depth interviews, surveys and focus groups that obtained input from 2,449 business owners and other individuals. Keen Independent also held public forums and received comments from the website, dedicated email address and dedicated telephone hotline for the study. Companies interviewed included minority- and women-owned firms, majority-owned firms, veteran-owned businesses and companies owned by persons with disabilities.

**Availability, utilization and disparity analyses.** Disparity analyses compare the percentage of entity contract dollars going to minority- and women-owned firms with what might be anticipated given the relative availability of MBEs and WBEs for individual entity contracts and subcontracts.

- Data for the availability analysis came from Keen Independent's online and telephone surveys that reached thousands of companies in Minnesota. Firms were asked about their availability for different types, sizes and locations of prime contracts and subcontracts for public agencies in the state.
- After completing surveys with 20,527 businesses in Minnesota, the study team reviewed responses to develop a database of companies that are potentially available for Admin and other participating entity work. The study team's research identified 5,064 businesses reporting that they were available for specific types of public sector procurements and subcontracts. Of those businesses, 9 percent were minority-owned and 18 percent were white women-owned (27.6% MBE/WBE in total).
- Keen Independent then determined the availability of MBEs, WBEs and majority-owned firms for each of the more than 76,000 Admin procurements examined in the study (including subcontracts). For some procurements, MBE/WBEs were a relatively large percentage of total firms available. There were other contracts for which only a few firms were available and none were MBE/WBEs. Keen Independent combined the results of these contract-by-contract availability analyses to calculate overall availability benchmarks. Based on this availability analysis, one might expect MBE/WBEs to have received 22.32 percent of Admin contract dollars during the study period.

Keen Independent compared the share of procurement dollars going to minority- and women-owned firms ("utilization") with what might be expected based on the availability analysis.

Admin applies the TG Program to its contracts, so any lack of disparity in Admin procurements might indicate success of this race- and gender-conscious program. Therefore, Keen Independent also considered disparity analysis results from other participating entities. This information helped the study team evaluate whether there would have been disparities in Admin procurement but for the TG Program.

## C. Quantitative and Qualitative Information for the Minnesota Marketplace

Keen Independent examined marketplace conditions based on U.S. Census data, survey information, in-depth interviews, public forums 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 Minnesota construction, professional services, goods and other services industries. This includes evidence of unequal opportunities to:

- Enter and advance as employees within certain study industries;
- Start and operate businesses within study industries; and
- Obtain financing and bonding.

Because of these barriers, there are fewer companies owned by minorities and women in Minnesota than might be expected.

Business outcomes also differed for MBE/WBEs compared with majority-owned companies.

- Compared with majority-owned companies, minority- and women-owned businesses in Minnesota are more likely to be small. Therefore, any disadvantages for small businesses disproportionately affect MBEs and WBEs.
- There is evidence that outcomes for minority- and women-owned firms differ from similarly-situated white male-owned companies, even after controlling for other factors. In particular, female business owners earned less than men who owned businesses.
- Success in Minnesota marketplace depends on relationships with other individuals, including customers, suppliers, bankers, prime contractors and subcontractors, depending on the type of business. Some of the minority and female interviewees reported unequal access to these relationships, stereotyping and other unequal treatment based on their race or gender.

Such information is important when Admin and other participating entities examine programs that assist MBE/WBE businesses.

**Results for persons with disabilities and veterans.** Persons with disabilities and veterans in Minnesota are more likely than other groups to own businesses in the study industries. However, there is also evidence that persons with disabilities who own businesses earn less than other business owners. Veterans who own businesses have slightly lower earnings than non-veteran business owners.

## D. Disparity Analysis

**Admin procurement.** Minority- and women-owned businesses received 11.47 percent of the Admin procurement dollars examined in this study, including payments to non-certified MBE/WBEs. Utilization of minority- and women-owned firms in Admin procurement was below



the 22.32 percent that might be expected from the availability analysis. Figure ES-1 presents these overall results from the disparity analysis.

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 Admin procurement is 51 (11.47% divided by 22.32%, multiplied by 100). Because the index is below 80, the disparity is “substantial,” according to guidance from the courts. The disparity occurred even though Admin operated the TG Program.

**Figure ES-1.**  
MBE/WBE utilization and availability for  
Admin procurements, July 2011–June 2016

Note:

76,010 procurements analyzed.

Source:

Keen Independent utilization and availability analyses for  
Admin procurements.

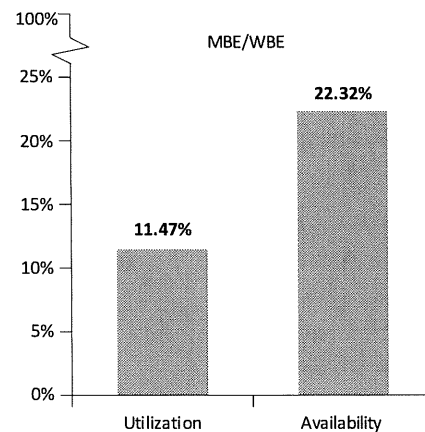


Figure ES-2 shows utilization, availability and disparity results for individual MBE groups as well as white women-owned firms. There were disparities for MBEs and WBEs overall.

**Figure ES-2.**

Disparity analysis for Admin procurements, July 2011–June 2016

|                                | Utilization    | Availability   | Disparity index |
|--------------------------------|----------------|----------------|-----------------|
| African American-owned         | 0.81 %         | 3.28 %         | 25              |
| Asian American-owned           | 1.65           | 2.02           | 82              |
| Hispanic American-owned        | 0.09           | 1.04           | 9               |
| Native American-owned          | 0.09           | 1.41           | 6               |
| Unknown MBE                    | 0.01           |                |                 |
| <b>Total MBE</b>               | <b>2.65 %</b>  | <b>7.76 %</b>  | <b>34</b>       |
| <b>WBE (white women-owned)</b> | <b>8.82</b>    | <b>14.56</b>   | <b>61</b>       |
| <b>Total MBE/WBE</b>           | <b>11.47 %</b> | <b>22.32 %</b> | <b>51</b>       |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Admin procurements.

Finally, Figure ES-3 presents results for Admin construction, professional services, goods and other services procurements. There were substantial disparities for each group except for Asian American-owned professional services firms.

Figure ES-3.

Disparity analysis for Admin procurements, July 2011–June 2016

|                              | Utilization    | Availability   | Disparity index |
|------------------------------|----------------|----------------|-----------------|
| <b>Construction</b>          |                |                |                 |
| African American-owned       | 0.00 %         | 1.91 %         | 0               |
| Asian American-owned         | 0.35           | 0.97           | 36              |
| Hispanic American-owned      | 0.19           | 1.04           | 18              |
| Native American-owned        | 0.21           | 3.33           | 6               |
| Unknown MBE                  | 0.00           |                |                 |
| Total MBE                    | 0.75 %         | 7.26 %         | 10              |
| WBE (white women-owned)      | 6.80           | 12.79          | 53              |
| <b>Total MBE/WBE</b>         | <b>7.56 %</b>  | <b>20.05 %</b> | <b>38</b>       |
| <b>Professional services</b> |                |                |                 |
| African American-owned       | 0.80 %         | 3.83 %         | 21              |
| Asian American-owned         | 2.75           | 2.47           | 111             |
| Hispanic American-owned      | 0.11           | 0.66           | 17              |
| Native American-owned        | 0.06           | 1.50           | 4               |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 3.72 %         | 8.46 %         | 44              |
| WBE (white women-owned)      | 9.41           | 15.11          | 62              |
| <b>Total MBE/WBE</b>         | <b>13.13 %</b> | <b>23.57 %</b> | <b>56</b>       |
| <b>Goods</b>                 |                |                |                 |
| African American-owned       | 0.51 %         | 2.18 %         | 23              |
| Asian American-owned         | 0.53           | 1.82           | 29              |
| Hispanic American-owned      | 0.02           | 2.03           | 1               |
| Native American-owned        | 0.02           | 0.25           | 8               |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 1.09 %         | 6.29 %         | 17              |
| WBE (white women-owned)      | 10.73          | 14.99          | 72              |
| <b>Total MBE/WBE</b>         | <b>11.82 %</b> | <b>21.28 %</b> | <b>56</b>       |
| <b>Other services</b>        |                |                |                 |
| African American-owned       | 2.81 %         | 5.15 %         | 55              |
| Asian American-owned         | 0.68           | 1.88           | 36              |
| Hispanic American-owned      | 0.03           | 0.75           | 4               |
| Native American-owned        | 0.20           | 0.50           | 40              |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 3.72 %         | 8.27 %         | 45              |
| WBE (white women-owned)      | 4.80           | 13.71          | 35              |
| <b>Total MBE/WBE</b>         | <b>8.52 %</b>  | <b>21.98 %</b> | <b>39</b>       |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Admin procurements, including subcontracts.

As shown in Figure ES-3, the TG Program has not eliminated disparities for minority- and women-owned firms in Admin procurement. Even with these efforts in place, there were substantial disparities for white women-owned firms and each MBE group (except for Asian American-owned professional services firms). Admin made substantial efforts to open procurement opportunities for MBE/WBE IT companies during the study period, including its SITE program, and it was largely IT consulting that accounted for the high participation of Asian American-owned professional services firms. In the previous disparity study, Asian American-owned firms obtained 0 percent of Admin professional services procurement dollars.

**Combined participating entity procurement.** The study team also analyzed whether there were disparities between MBE/WBE utilization and availability for entity procurement combined. Figure ES-4 aggregates results for Admin, Minnesota State, Minnesota Department of Transportation, Metropolitan Airports Commission, Metropolitan Mosquito Control District, Metropolitan Council, City of Minneapolis, City of Saint Paul and Hennepin County.

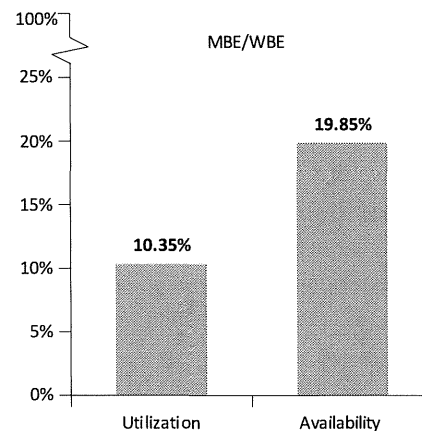
The combined utilization of minority- and women-owned firms in participating entity procurement during the study period — 10.35 percent of total procurement dollars — was below the 19.85 percent that might be expected from the availability analysis.

The resulting disparity index for MBE/WBEs is 52. The disparity occurred even though eight of the nine entities operated race- and gender-based programs during this time period and the ninth entity (Hennepin County) drew from a pool of certified firms that was largely MBE/WBEs.

Figure ES-4.  
MBE/WBE utilization and availability for  
combined entity procurements,  
July 2011–June 2016

Note:  
125,474 procurements analyzed.

Source:  
Keen Independent utilization and availability analyses for  
combined entity procurements.



## E. Recommendations

The TG Program has not eliminated disparities for minority- and women-owned firms in Admin procurement. Even with these efforts in place, there were substantial disparities for white women-owned firms and each MBE group across each industry except for one group in professional services contracts.

Keen Independent recommends that Admin and other participating entities:

1. Work together to address barriers and open opportunities for minority- and women-owned firms and other small businesses;
2. Based on all information available, consider retaining and more fully implementing existing programs;
3. Pursue opportunities for new and better tools to address barriers;
4. Better track and report results on MBE/WBE participation; and
5. Carefully consider study results and other information to determine future program eligibility by group.

**1. Work together to address barriers and open opportunities for MBE/WBEs and other small businesses.** There is a need for a broad combined effort by participating entities and other partners to address the effects of race and gender discrimination in employment, entrepreneurship and business success. Admin and other participating entities might work together to:

- a. Better communicate procurement opportunities, coordinate outreach and build a joint bidders list.
- b. Strengthen local technical assistance, financing, bonding assistance and other capacity-building efforts.
- c. Improve virtual assistance portals for businesses in Minnesota.
- d. Maintain efforts that enforce non-discrimination in employment as well as further training, employment and advancement for women and people of color in certain industries.
- e. Jointly work to streamline and simplify public procurement processes, including unbundling large contracts, removing unnecessary contract specifications, writing procurement documents in plain language, routinely providing feedback to bidders and proposers, and prompt payment.
- f. Share best practices and results of pilot programs among government entities.
- g. Streamline certification and pursue reciprocity or joint certification when possible.
- h. Jointly pursue action by the State Legislature to reduce barriers to public sector procurement embedded in state law.

**2. Based on all information available, consider retaining and more fully implementing existing programs.** Admin's program includes provisions for:

- Price and evaluation preferences;
- Contract goals;
- Encouraging purchases from an TG/ED/VO vendor for procurements under \$5,000;
- An Equity Select program that allows for direct selection of a TG/ED/VO business for purchases over \$5,000 and not greater than \$25,000; and
- The ability to set aside procurements for bidding from certified businesses.

Admin should consider retaining certain of these programs and more broadly implementing them, after reviewing the information it has from this report and other sources and conducting further legal review. For example:

- a. Setting contract goals for professional and technical services contracts and/or awarding preference points for certified TG/ED/VO participation as subcontractors.
- b. Increasing MBE participation in subcontracts by subdividing overall contract goals for contracts into an MBE portion and an "other TG/ED/VO" portion.
- c. Evaluating whether it can expand its sheltered market program for certain types of procurements above the reach of the Equity Select program.

**3. Pursue opportunities for new and better tools to address barriers.** After reviewing all available information and legal issues, Admin might evaluate and consider seeking authority to:

- a. Increase the maximum amount of the price/evaluation preference (currently up to 6%), the maximum for any price preference (currently \$60,000) for TG/ED/VO businesses (or perhaps just TG businesses), and the types of procurements for which it may be applied (currently not applied to all types of procurements).
- b. Increase the current \$25,000 limit (perhaps to \$50,000) on the Equity Select program that allows for Admin's direct selection of a TG/ED/VO business for small purchases.
- c. Expand specialized prime contractor/prime consultant capacity-building program for specific types of small construction and professional services contracts.
- d. Ensure that it chooses to employ a race- and gender-neutral approach (such as a program open to all SBEs) and not a race- and gender-based program when the neutral program might be effective in addressing the identified barriers.

**4. Better track and report results on MBE/WBE participation.** Admin should develop procedures to record ownership information for its vendors and subcontractors (self-reported) and improve its tracking MBE/WBE participation, by group and industry, in its procurement. This should be in addition to new efforts to track and report participation of certified businesses.

**5. Carefully consider study results and other information to determine program future eligibility for each group.** The disparity results suggest that the TG Program may have had a positive impact on the utilization of minority- and women-owned firms but disparities persisted.

- Each group previously ineligible for program participation in certain industries showed a substantial disparity.
- Utilization of Asian American-owned firms exceeded the availability benchmark for Admin professional services procurements. Admin might consider this a measure of the success of its race-conscious efforts in professional services, including its SITE program for IT procurements, as the 2009 Disparity Study reported 0 percent utilization of Asian American-owned professional services firms.

Admin should review this evidence along with other information in the Joint Disparity Study and other sources when considering whether to apply race- and gender-conscious programs and the eligibility for those programs.

## **F. Public Participation in the Disparity Study**

In addition to considerable time devoted to the study by their own staff, the government entities participating in the Joint Disparity Study implemented an extensive public participation process. These activities included:

- Obtaining regular feedback from an External Stakeholder Group that met with the study team once per quarter throughout the project. The External Stakeholder Group included representatives of the local business community and community groups that had an interest in entity contracting and programs, and small business development.
- Distribution of information to interested groups through press releases, email blasts and presentations.
- A study website that posted information about the 2017 Joint Disparity Study from the outset of the study.
- A telephone hotline and dedicated email address for anyone wishing to comment.
- Public forums at the start of the study and after the draft report release to obtain input from stakeholders and other interested groups.
- Through online 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 reached 20,527 businesses).
- In-depth interviews and focus groups with businesses, trade associations and others.

Keen Independent and the participating entities sought public input regarding the study and draft Disparity Study report. The public was able to give feedback and provide written comments:

1. In person at public forums (including comment cards collected at those meetings);
2. Through the study website;
3. By calling the study telephone hotline;
4. Via email; and
5. Through regular mail to Keen Independent Research.

Keen Independent reviewed information from the public forums and written and telephone comments before preparing the final Disparity Study report. This information will aid Admin and other participating entities in making decisions concerning continuation or enhancement of existing programs and implementation of new programs.

## CHAPTER 1.

### Introduction

Keen Independent Research LLC (Keen Independent) conducted the 2017 Minnesota Joint Disparity Study for the Minnesota Department of Administration (Admin) and other participating state and local government entities.

The study examines whether there is a level playing field for minority- and women-owned firms in the Minnesota marketplace. Research included whether Admin's current programs are effective in eliminating any disparities in the utilization of minority- and women-owned businesses in its procurement. This study also analyzes marketplace conditions for veteran-owned businesses and companies owned by persons with disabilities.

The state and local government entities ("participating entities") in the Joint Disparity Study are:

- Minnesota Department of Administration, including the Minnesota Department of Transportation (separate studies);
- Minnesota State Colleges and Universities (Minnesota State);
- Metropolitan Airports Commission;
- Metropolitan Council;
- Metropolitan Mosquito Control District;
- City of Minneapolis;
- City of Saint Paul, including the Housing and Redevelopment Authority; and
- Hennepin County.

Participating entities can use these study results and other information they have to make decisions about continuation or enhancement of existing programs and implementation of new programs. The Joint Disparity Study began in summer 2016 and research was completed in spring 2018. The Minnesota Department of Administration last conducted a disparity study in 2009.<sup>1</sup>

The balance of Chapter 1:

- A. Introduces the study team;
- B. Outlines analyses conducted and where results appear in the final report;
- C. Describes the public participation process throughout the study; and
- D. Summarizes how anyone could provide input on future programs and the draft report.

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<sup>1</sup> MGT of America, Inc. *State of Minnesota Joint Availability and Disparity Study, Minnesota Department of Administration*, October 22, 2009.



## A. Study Team

David Keen, Principal of Keen Independent, directed this study. He has led more than 100 similar studies, including those for the City of Minneapolis, City of St. Paul and Hennepin County in the 1990s. Annette Humm Keen, Principal, directed all qualitative research.

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

As shown in Figure 1-1, four Minnesota-based firms participated in the study — Felton Financial Forensics, C J Petersen & Associates, Fondungallah & Kigham, and KLD Consulting. These four team members are minority- and/or women-owned firms.

BBC Research & Consulting prepared the quantitative analysis of marketplace conditions and assisted in compiling firm ownership information. Customer Research International (CRI) performed telephone interviews with firm owners and managers as part of the availability data collection.

Figure 1-1.  
2017 Minnesota Joint Disparity Study team

| <b>Firm</b>  | <b>Location</b>              | <b>Team Leader</b>  | <b>Responsibilities</b>                            |
|--|------------------------------|---|--|
| Keen Independent Research LLC,<br>prime consultant | Denver, CO<br>Wickenburg, AZ | David Keen<br>Annette Humm Keen<br>Principals               | All study phases                                   |
| Holland & Knight LLP (H&K)                         | Atlanta, GA                  | Keith Wiener<br>Partner                                     | Legal framework                                    |
| Felton Financial Forensics &<br>Valuation LLC      | Edina, MN                    | Mark Felton<br>Principal                                    | Data collection and<br>in-depth interviews         |
| Fondungallah & Kigham LLC                          | Saint Paul, MN               | Michael Fondungallah<br>Esquire<br>Pamela Kigham<br>Esquire | Public outreach and<br>in-depth interviews         |
| C J Petersen & Associates, LLC                     | Saint Paul, MN               | Catherine J. Petersen<br>Principal                          | In-depth interviews                                |
| KLD Consulting                                     | Minneapolis, MN              | Kathie Doty<br>Principal                                    | Public outreach and<br>in-depth interviews         |
| BBC Research & Consulting (BBC)                    | Denver, CO                   | Kevin Williams<br>Managing Director                         | Quantitative analysis of<br>marketplace conditions |
| Customer Research International<br>(CRI)           | San Marcos, TX               | Sanjay Vrudhula<br>President                                | Availability telephone<br>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 have MBE programs or any other programs benefitting a group based on race. Legal restrictions also apply to gender-conscious programs.

Even if a targeted business program does not consider race or gender, it can still be subject to legal challenge. However, such programs are more easily defended by the enacting jurisdiction. The jurisdiction need only show that it has a “rational basis” for the program. These types of programs include small business enterprise (SBE) programs and those that provide assistance to firms based on whether they are owned by veterans or by persons with disabilities. Chapter 2 of the report explains the different legal standards that a state or local jurisdiction would need to meet in order to legally support different types of programs. Holland & Knight also prepared a detailed analysis of relevant legal cases, presented in Appendix B.

**Programs.** At the time of this report, the State of Minnesota had an overall annual goal of 25 percent of its procurement dollars going to small businesses. Admin operates the Targeted Group, Economically Disadvantaged and the Veteran (TG/ED/VO) Small Business Procurement Program to help reach this goal. This program provides preferences to certified minority- and women-owned firms, companies owned by people with a substantial physical disability, businesses located in an economically disadvantaged area, and veteran-owned businesses. Eligible businesses must be based in Minnesota and fit below the U.S. Small Business Administration size ceilings for their subindustry.

The TG/ED/VO Program applies to construction, professional and technical services, and goods and other services contracts. Based on Admin’s review of the results of its 2009 disparity study, not all minority groups are eligible for preferences in each industry.<sup>2</sup> Chapter 3 describes these programs in more detail. Appendix K explains programs and types of certification for Admin and each of the other participating entities.

**Department of Administration contracts and subcontracts.** The Department of Administration makes purchases for 88 business units in state government. Keen Independent obtained information about payments for Admin procurements maintained in the StateWide Integrated Financial Tools online system (SWIFT). Keen Independent examined payments made within the study period (July 1, 2011 through June 30, 2016).

Because Admin does not have comprehensive information about subcontracts for its construction contracts, Keen Independent augmented SWIFT data for construction data by examining IC134 information collected by the Minnesota Department of Revenue. By state law, prime contractors and

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<sup>2</sup> Based on the 2009 State Agencies Disparity Study, Asian American construction subcontractors do not count toward the TGB project subcontracting goal; African American do not count as underutilized business for professional services, and African American, American Indian and Asian American do not count as underutilized business for other services.

subcontractors working on state and local government construction contracts report payments they received on these contracts.

The study for Admin does not include Minnesota Department of Transportation highway construction and engineering contracts. Minnesota State contracts are also examined in a separate report for that entity. The study includes some federally-funded contracts, but none that were U.S. Department of Transportation-funded (the Federal Disadvantaged Business Enterprise Program applies to such contracts).

Chapter 4 summarizes information about Admin procurements. Appendix C further explains the methods used to compile and analyze this information.

**Marketplace conditions.** The study team compiled and analyzed quantitative information about outcomes for minorities and women, and minority- and women-owned firms in the Minnesota marketplace. Chapter 5 summarizes results, and Appendices E through I provide supporting detail.

Study team members also conducted in-depth interviews with business owners and managers and with trade association representatives in Minnesota. These included interviews with minority- and women-owned firms, veteran-owned businesses and companies owned by persons with disabilities. Chapter 5 also reviews these results and Appendix J provides a detailed reporting of representative comments.

**Availability analysis.** Disparity analyses compare the percentage of entity contract dollars going to minority- and women-owned firms with what might be anticipated given the relative availability of MBEs and WBEs for individual entity contracts and subcontracts. Data for the availability analysis came from Keen Independent's online and telephone surveys that reached thousands of companies in Minnesota. Firms were asked about their availability for different types, sizes and locations of prime contracts and subcontracts for public agencies in the state.

Chapter 6 presents the availability benchmarks for Admin construction, professional services, goods and other services procurements for each MBE group and for WBEs. Appendix D describes the survey process and results.

**Utilization and disparity analysis.** Chapter 7 compares utilization of minority- and women-owned firms with the availability benchmarks described in Chapter 6. It includes statistical analysis of whether random chance in contract awards could explain any observed disparities. Keen Independent presents results by minority group and for white women-owned firms.

Keen Independent further explores MBE/WBE utilization in Admin procurement in Chapter 8. This chapter includes separate disparity analyses for Admin construction, professional services, goods and other services contracts.

As Admin typically applies the TG Program to its procurements, any lack of disparity in Admin procurements might indicate success of this race- and gender-conscious program. To better understand whether there would be disparities in Admin procurement absent any such program, Keen Independent reviewed disparity analysis results from other participating entities, especially for contracts for which no such programs applied. Chapter 9 summarizes these results.

**Summary of results and conclusions.** In Chapter 10, Keen Independent summarizes the information about conditions and outcomes for minority- and women-owned firms, including the collective results of the utilization, availability and disparity analyses and results of study team research on the Minnesota marketplace. The study team also makes suggestions for Admin consideration concerning any need to continue the TG portion of the program, and how elements of the program might be improved.

Figure 1-2 outlines the chapters in the 2017 Joint Disparity Study final report for Admin.

Figure 1-2. Chapters in 2017 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 veterans and persons with disabilities |
| 3. Entities' Programs                          | Programs currently in place to assist MBEs, WBEs, veteran-owned firms, businesses owned by persons with disabilities and other small businesses |
| 4. Entity Contracts                            | How the study team compiled data about participating entity contracts and subcontracts and the utilization of MBEs and WBEs                     |
| 5. Marketplace Conditions                      | Conditions for minorities and women, minority- and women-owned firms and businesses owned by veterans and persons with disabilities             |
| 6. Availability Analysis                       | Approach and results for determining the availability of minority- and women-owned firms for entity contracts                                   |
| 7. Utilization and Disparity Analysis          | Comparison of utilization and availability for minority- and women-owned businesses   |
| 8. Further Exploration of MBE/WBE Utilization  | Further examination of disparity results to determine if any disparities can be explained by neutral factors                                    |
| 9. Disparity Analysis Results for all Entities | Examination of utilization and disparity results for participating entities based on types of programs in place                                 |
| 10. Summary of Results and Conclusions         | Synthesis of results and recommendations  |

Figure 1-3 outlines the appendices included in the final report.

Figure 1-3. Appendices in 2017 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. Contract Data Collection                             | 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 participating entity contracts                             |
| E. Entry and Advancement in the Marketplace             | Quantitative analysis of any disparities in employment and advancement of minorities, women, veterans and persons with disabilities |
| F. Business Ownership in the Marketplace                | Quantitative analysis of any disparities in business ownership  |
| G. Access to Capital in the Marketplace                 | Quantitative analysis of any disparities in access to capital   |
| H. Success of Businesses in the Marketplace             | Quantitative analysis of disparities in business success  |
| I. Description of Data Sources for Marketplace Analyses | Documentation of sources for quantitative analyses of marketplace conditions  |
| J. Qualitative Information for the Marketplace          | Analysis of in-depth interviews and other sources   |
| K. Summary of Participating Entity Programs             | Existing programs for firms owned by minorities, women, veterans and persons with disabilities                                      |

### C. Public Participation in the 2017 Joint Disparity Study

The government entities participating in the Joint Disparity Study implemented an extensive public participation process as part of the study. To date, these activities have included:

- An External Stakeholder Group that met with the study team once per quarter throughout the project and included representatives of the local business community and community groups that had an interest in entity contracting and programs, and small business development. This group provided input on perceived strengths and weaknesses of past disparity studies, information sources, outreach efforts and program opportunities.
- Distribution of information to interested groups through press releases, email blasts and presentations.
- A study website that posted information about the 2017 Joint Disparity Study from the outset of the study.

- A telephone hotline and dedicated email address for anyone wishing to comment.
- Public forums at the start of the study and after the draft report release to obtain input from stakeholders and other interested groups.
- Through online 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 reached 20,527 businesses surveys).
- In-depth personal interviews and focus groups with business owners, managers, trade association representatives and public sector procurement and project management staff.

#### **D. Public Comment Process for the 2017 Joint Disparity Study Report**

Keen Independent and the participating entities sought public input regarding the study and draft Disparity Study report. The public was able to give feedback and provide written comments:

1. In person public forums (including comment cards at those meetings);
2. Through the study website
3. By calling the study telephone hotline;
4. Via email; and
5. Through regular mail to Keen Independent Research.

Keen Independent reviewed information from the public forums and written and telephone comments before preparing the final Disparity Study report. This information will aid Admin and other participating entities in making decisions concerning continuation or enhancement of existing programs and implementation of new programs.

## CHAPTER 2.

### Legal Framework

Targeted business programs are subject to legal challenge. Different standards of legal review apply depending on whether a program considers the race, ethnicity or gender of a business owner (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.

#### 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. Legal restrictions also apply to gender-conscious programs.

Since 1989, several state and local entities in Minnesota have faced lawsuits or threats of legal challenge regarding their minority and women business programs. The Minnesota Department of Transportation has also defended its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program (see Appendix B).

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

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 *Croson* 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.

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

- **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.

**Intermediate scrutiny for gender-based 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 district court in *Geyer Signal, Inc. v. Minnesota DOT* recognized the intermediate scrutiny standard (see Appendix B).<sup>2</sup>

### **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.

**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. As noted above, the rational basis legal standard that might generally apply to such programs 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.

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<sup>2</sup> 2014 W.L. 1309092 at footnote 4, *citations omitted*.



## **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).

## **Programs Pertaining to Federally-funded Contracts**

The State, MnDOT, metropolitan agencies and local governments in Minnesota also follow federal regulations and requirements to apply MBE/WBE or DBE programs for certain federally-funded contracts. U.S. Department of Transportation-funded contracts, for which the Federal DBE Program typically applies, are not part of the 2017 Minnesota Joint Disparity Study.

## CHAPTER 3.

### Programs Operated by Admin and Other Entities

#### A. Admin Programs

The State of Minnesota has an overall annual goal of 25 percent of its procurement dollars going to small businesses. The State operates the Targeted Group, Economically Disadvantaged and the Veteran (TG/ED/VO) Small Business Procurement Program to help reach this goal. This program provides preferences to certified minority- and women-owned firms, companies owned by people with a substantial physical disability, businesses located in an economically disadvantaged area, and veteran-owned businesses. Eligible businesses must be based in Minnesota and fit below the U.S. Small Business Administration size ceilings for their subindustry.<sup>1</sup> A firm certified as a disadvantaged business enterprise (DBE) can be certified as a TGB by signing an affidavit that its principal place of business is in Minnesota.

The TG/ED/VO Program applies to construction, professional and technical, and goods and other services as defined by the Commissioner of the State of Minnesota Department of Administration.<sup>2</sup>

**Preferences.** For price-based awards, TG/ED/VO business may be eligible up to a 6 percent preference of the amount of their bid for the first \$1 million of the procurement, not to exceed \$60,000. The price preference program is lower for some goods and services (2% for vehicles and 1% for items for resale, for example).

TG/ED/VO businesses receive a preference equal to 6 percent of the total evaluation points in a qualifications-based award.

Admin staff report that the preference program works to include some TG/ED/VO businesses in state contracts. Admin often splits state-wide goods and services contracts between multiple awardees. Although the TG/ED/VO business might not be the lowest bidder, the preference can make the certified business sufficiently price-competitive to reach the list of approved vendors for these contracts. Individual departments might then choose to purchase from the TG/ED/VO vendor.

**Contract goals.** Admin has the authority to set TG/ED/VO participation goals on construction and professional and technical services contracts. Admin can decide not to put a goal on a contract (but the price preference program is always in place).

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<sup>1</sup> This approach to size standards changed on July 1, 2015, although it appears that no businesses certified under the previous size standard lost their certification based on the new standards.

<sup>2</sup> Based on the 2009 State Agencies Disparity Study, Asian American-owned firms do not count toward the TGB contract goals for construction projects, African American-owned firms do not count as underutilized businesses for professional services contracts, and African American-, American Indian- and Asian American-owned firms do not count as underutilized businesses for other services.

Admin generally considers setting contract goals on construction contracts of \$500,000 or more. The goal can combine TG/ED/VO participation or Admin can set separate goals for each group. Admin typically did not set goals for professional and technical services contracts during the study period.

Contract goals are based on subcontracting opportunities, location and availability of TG/ED/VO to perform the work.

Over the course of the contract, the successful prime contractor must meet the goal or show good faith efforts to do so. (Bidders are not required to identify certified firms at time of bid.) Over the course of the contract, the successful prime contractor must meet the goal or show good faith efforts to do so. The penalty for non-compliance is up to \$60,000, which Admin has assessed. According to staff, compliance improved after they learned about Admin's use of penalties.

**Other measures.** In July 2016, Admin launched a new Equity Select program that allows for direct selection of a TG/ED/VO business for purchases over \$5,000 and not greater than \$25,000.

Admin has also implemented specific programs to encourage participation of minority- and women-owned firms. For example, within IT procurements, Admin made additional efforts to include MBE/WBE firms through its SITE program.

## **B. Other Federal, State and Local Government Programs**

U.S. Department of Transportation funding, which requires operation of the Federal Disadvantaged Business Enterprise (DBE) Program, typically goes to the Minnesota Department of Transportation (MnDOT). MnDOT operates the DBE Program for those USDOT-funded contracts.

In addition, each of the other eight participating entities has programs that assist small businesses, and sometimes minority- and women-owned companies. Appendix K provides more information about these programs.

## **C. Business Assistance and Other Programs in Minnesota**

There is a broad range of technical assistance, networking, financial and bonding assistance, and other small business assistance in Minnesota. As one example, the Minnesota Procurement Technical Assistance Center (PTAC), which is now part of the Minnesota Department of Administration, provides a wide range of counseling, bid-matching services, matchmaking events and other assistance to Minnesota businesses. (See Appendix K for additional information.)

## CHAPTER 4.

### Admin Contracts

Many components of the disparity study require participating entity contract and subcontract data as building blocks. As a first step in the availability research, for example, Keen Independent identified the geographic area from which the Minnesota Department of Administration draws contractors and vendors and the types of work involved in Admin contracts. The study team's utilization and disparity analyses for Admin are based on information from prime contracts and subcontracts.

Before conducting other analyses, Keen Independent collected information for Admin contracts for the July 2011 through June 2016 study period. Chapter 4 describes the study team's process for compiling and merging these data. Chapter 4 consists of four parts:

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

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

#### A. Overview of Admin Contracts

The Department of Administration makes purchases for 88 business units in state government. Keen Independent obtained information about construction, professional services, goods and other services through payments data maintained in the StateWide Integrated Financial Tools online system (SWIFT). Keen Independent examined procurements made from July 1, 2011 through June 30, 2016.<sup>1</sup> This provided a five-year study period with start and end dates matching a state fiscal year.

**Non-construction contracts.** Analysis of Admin procurement excludes highway-related construction and professional services contracts made by the Minnesota Department of Transportation. Minnesota State Colleges and Universities procurement is also not included.<sup>2</sup>

**Construction contracts and subcontracts.** Keen Independent totaled payments for each year of the five-year study period for each non-construction procurement identified in SWIFT.

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<sup>1</sup> Note that the study team uses "procurements," "purchases" and "contracts" interchangeably in this report.

<sup>2</sup> Minnesota Department of Transportation and Minnesota State Colleges and Universities as part of the 2017 Joint Disparity Study have their own disparity study report.

Because Admin does not typically collect information about subcontractors used in its contracts, Keen Independent developed information for Admin contracts from IC134 data maintained by the Minnesota Department of Revenue.

## B. Collection and Analysis of Admin Contract Data

As shown in Figure 4-1, Keen Independent collected data on Admin's contracts from SWIFT and IC134 data. Appendix C provides more information about this process.

SWIFT provided information about award date, dollars, location of the work (region) and general description of the work.

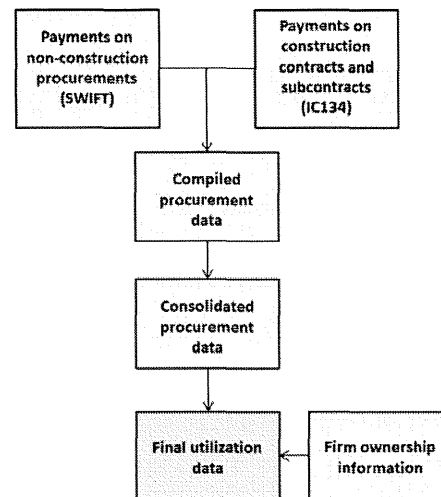
**Payment amounts.** The study team consolidated about 3.3 million payment records found in the SWIFT data for the five-year study period. Keen Independent then consolidated payments data into individual procurements.

Keen Independent compiled IC134 data for construction contracts for state agencies other than MnDOT (highway-related) and Minnesota State. The study team separated the dollars for a construction contract into those going to subcontractors from the dollars retained by the prime contractor. Keen Independent calculated the total dollars retained by the prime contractor by subtracting subcontractor dollars from the total contract value. Appendix C discusses IC134 data in more detail.

**Coding the type of construction, good or service provided.** The study team coded the primary type of goods or services provided in each procurement based upon data in Admin procurement records. SWIFT uses United Nations Standard Products and Services Codes (UNSPSC) to record work types for Admin procurements. Keen Independent translated UNSPSC codes into 8-digit subindustry codes developed by Dun & Bradstreet. Keen Independent developed the work types for construction subcontractors based on the primary line of work for those firms identified by Dun & Bradstreet.

When contracts or subcontracts pertained to multiple types of work, Keen Independent coded the entire work element based on what appeared to be the predominant type of work in the contract or subcontract. For example, if a subcontract included fencing and landscaping, and it appeared that the work was predominantly fencing, the entire subcontract was coded as fencing.<sup>3</sup> Similarly, when a more specialized activity could not be identified as the primary area of work, these contracts were classified as general building construction, as appropriate.

Figure 4-1.  
Collection of Admin contract data



<sup>3</sup> Data concerning subcontract awards or payments were for the entire subcontract, not individual work elements.

For IC134 prime contractors and subcontractors, the study team used the primary SIC code of the firm to code the type of work since IC134 data does not include a description of the work performed by the prime or subcontractor.

**Coding the region for location-specific contracts.** Keen Independent examined the geographic location of contracts based on the six regions shown in Figure 4-8 at the end of this chapter. The region for a contract corresponds to the physical location of the project, not the address of the contractor or vendor. Keen Independent coded Admin's general goods purchases as well as statewide assignments and work not in a single physical location as "statewide."

**Contracts not included.** Keen Independent focused on procurements made with for-profit companies. The analysis did not include MnDOT highway work or Minnesota State purchases, explained below.

**MnDOT and Minnesota State procurements.** Highway construction and engineering contracts for the Minnesota Department of Transportation were excluded from data examined for Admin. This was done by excluding certain fund codes and worktype codes used in SWIFT. Similarly, Keen Independent did not include procurement dollars spent by Minnesota State Colleges and Universities.

**Exclusion of payments to non-businesses, for real property purchase or lease, and for certain types of work.** The study team excluded payments related to:

- Government;
- Not-for-profits;
- Utilities;
- Phone services;
- Banks;
- Educational institutions;
- Insurance companies;
- Travel expenses;
- Products related to national markets (computers and software, for example); and
- Physician, hospital and related services (with certain exceptions, such as benefits management, medical testing, pharmaceuticals and medical equipment).

**Exclusion of very small purchases.** The study team examined procurements that totaled more than \$2,000 in payments. This accounted for 98 percent of the total payments during the study period (after exclusions). However, all subcontracts identified in IC134 data were included.

### C. Types of Work Involved in Admin Contracts

After consolidating the procurement data, making necessary exclusions and replacing construction contracts from Admin's SWIFT data with information from the IC134 data, there was a total of 76,010 contracts and subcontracts in the utilization analysis for Admin. These contracts totaled \$3.1 billion. Figure 4-2 presents the number and dollar value of Admin contracts and subcontracts included in the disparity study.

Figure 4-2.  
Number and dollars of Admin contracts and subcontracts,  
July 2011–June 2016

|                       | Number<br>of contracts | Dollars<br>(millions) |
|-----------------------|------------------------|-----------------------|
| Construction          | 4,744                  | \$ 506                |
| Professional services | 19,743                 | 1,595                 |
| Goods                 | 37,152                 | 699                   |
| Other services        | 14,371                 | 315                   |
| Total                 | 76,010                 | \$ 3,115              |

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

Source: Keen Independent from Admin contract data.

**Construction contract dollars.** Figure 4-3 presents information about contract dollars for 26 categories of work on Admin construction contracts. 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, public or commercial building construction accounted for the most dollars.

Figure 4-3.

Admin construction contract dollars by type of work, July 2011–June 2016

| Type of work   | Total               |         |
|--|---------------------|---------|
|  | Dollars<br>(1,000s) | Percent |
| Public or commercial building construction             | \$ 138,438          | 27.4 %  |
| Road construction or paving                            | 83,641              | 16.5    |
| Plumbing, heating or air conditioning                  | 44,261              | 8.8     |
| Electrical work including lighting and signals         | 32,981              | 6.5     |
| Excavation, site prep, grading and drainage            | 22,589              | 4.5     |
| Concrete work  | 19,960              | 3.9     |
| Roofing  | 13,271              | 2.6     |
| Underground utilities, including water and sewer lines | 10,153              | 2.0     |
| Bridge or elevated highway construction                | 7,071               | 1.4     |
| Architecture and engineering                           | 6,012               | 1.2     |
| Building materials                                     | 3,430               | 0.7     |
| Structural steel work                                  | 1,725               | 0.3     |
| Plastering, drywall or insulation                      | 1,587               | 0.3     |
| Landscape installation and maintenance                 | 711                 | 0.1     |
| IT and data services                                   | 356                 | 0.1     |
| Staffing services                                      | 216                 | 0.0     |
| Industrial equipment                                   | 202                 | 0.0     |
| Trucking and hauling                                   | 146                 | 0.0     |
| Construction equipment rental                          | 58                  | 0.0     |
| Sign and traffic control equip rental                  | 43                  | 0.0     |
| Heavy construction equipment                           | 39                  | 0.0     |
| Electrical equipment                                   | 39                  | 0.0     |
| Environmental consulting                               | 18                  | 0.0     |
| Inspection and testing                                 | 9                   | 0.0     |
| Other construction                                     | 117,257             | 23.2    |
| Other non-construction                                 | 1,468               | 0.3     |
| Total  | \$ 505,680          | 100.0 % |

Source: Keen Independent from Admin contract data.

**Professional services contract dollars.** Figure 4-4 examines contract dollars for the types of work on Admin professional services contracts. IT and data services represented the most dollars of these contracts. Note that the \$13 million in construction-related dollars included under professional services are related to subcontracts performed for construction management companies and other professional services firms that were prime contractors on Admin construction contracts.



Figure 4-4.  
Admin professional services contract dollars by type of work,  
July 2011–June 2016

| Type of work                                | Total               |         |
|---|---------------------|---------|
|   | Dollars<br>(1,000s) | Percent |
| IT and data services                        | \$ 641,725          | 40.2 %  |
| Business research and consulting            | 277,753             | 17.4    |
| Architecture and engineering                | 207,032             | 13.0    |
| Construction management                     | 186,513             | 11.7    |
| Environmental consulting                    | 76,977              | 4.8     |
| Advertising, marketing and public relations | 71,753              | 4.5     |
| Inspection and testing                      | 42,276              | 2.7     |
| Other professional services                 | 77,478              | 4.9     |
| Construction-related                        | 13,231              | 0.8     |
| Total                                       | \$ 1,594,738        | 100.0 % |

Source: Keen Independent from Admin contract data.

**Goods procurement dollars.** Figure 4-5 presents dollars by type of goods purchased by Admin during the study period. (The analysis excluded computers, off-the-shelf software and other goods primarily purchased from a national market.) Vehicle purchases, food and communications equipment were the largest areas of goods spending.

Figure 4-5.  
Admin goods contract dollars by type of work, July 2011–June 2016

| Type of work                 | Total               |         |
|------------------------------|---------------------|---------|
|                              | Dollars<br>(1,000s) | Percent |
| Cars and trucks              | \$ 112,181          | 16.0 %  |
| Food                         | 88,651              | 12.7    |
| Communications equipment     | 88,538              | 12.7    |
| Building materials           | 56,344              | 8.1     |
| Pharmaceuticals              | 49,707              | 7.1     |
| Medical equipment            | 46,624              | 6.7     |
| Office equipment             | 31,620              | 4.5     |
| Office supplies              | 31,115              | 4.4     |
| Industrial equipment         | 28,067              | 4.0     |
| Furniture                    | 25,934              | 3.7     |
| Vehicle parts and supplies   | 16,385              | 2.3     |
| Heavy construction equipment | 9,842               | 1.4     |
| Petroleum                    | 8,550               | 1.2     |
| Electrical equipment         | 6,487               | 0.9     |
| Other goods                  | 97,880              | 14.0    |
| Construction-related         | 1,480               | 0.2     |
| Total                        | \$ 699,405          | 100.0 % |

Source: Keen Independent from Admin contract data.

**Other services procurement dollars.** Procurement dollars by type of other services work are shown in Figure 4-6. Security systems services, waste collection and disposal, vehicle repair and printing and copying were the four highest dollar types of other services purchases.

Figure 4-6.

Admin other services contract dollars by type of work, July 2011–June 2016

| Type of work                           | Total               |         |
|--|---------------------|---------|
|  | Dollars<br>(1,000s) | Percent |
| Security systems services              | \$ 62,241           | 19.7 %  |
| Vehicle repair                         | 26,155              | 8.3     |
| Waste collection and disposal          | 19,183              | 6.1     |
| Printing and copying                   | 22,937              | 7.3     |
| Equipment repair services              | 17,333              | 5.5     |
| Contracted food service                | 16,979              | 5.4     |
| Building cleaning                      | 16,898              | 5.4     |
| Landscape installation and maintenance | 6,322               | 2.0     |
| Staffing services                      | 4,755               | 1.5     |
| Security guard services                | 4,214               | 1.3     |
| Trucking and hauling                   | 4,100               | 1.3     |
| Elevator services                      | 3,109               | 1.0     |
| Snow removal services                  | 2,763               | 0.9     |
| Facilities operation and support       | 2,693               | 0.9     |
| Construction equipment rental          | 1,299               | 0.4     |
| Parking services                       | 760                 | 0.2     |
| Local transportation services          | 33                  | 0.0     |
| Other services                         | 100,411             | 31.9    |
| Construction-related                   | 3,043               | 1.0     |
| Total                                  | \$ 315,228          | 100.0 % |

Source: Keen Independent from Admin contract data.

#### D. Location of Businesses Receiving Admin Contracts

Analyses of local marketplace conditions and the availability of firms to perform contracts and subcontracts focus on the “relevant geographic market area” for Admin contracts. The relevant geographic market area for each industry was determined through the following steps:

- For each prime contractor and subcontractor, Keen Independent determined whether the company had a business establishment in Minnesota or the two counties in western Wisconsin that are part of the Minneapolis-St. Paul Metropolitan Area (Pierce and St. Croix counties) based upon Admin vendor records and additional research.
- Keen Independent then added the dollars for firms with Minnesota and the two Wisconsin county locations and compared the total with that for all companies.
- The study team totaled dollars by firm location based on data for July 2011 through June 2016.

The analysis described above found that 80 percent of combined Admin contract dollars went to firms with locations in Minnesota (or the two Wisconsin counties). As shown in Figure 4-7, the share of purchases going to local companies was 75 percent for Admin goods purchases (which do not include procurements primarily made from a national market). For construction contracts and subcontracts, 94 percent of Admin contract dollars went to businesses that had locations within the state.

**Figure 4-7.**  
Dollars of Admin prime contracts and subcontracts by location of firm, July 2011–June 2016

Note:

Pierce and St. Croix counties in Wisconsin included in Minnesota total.

Numbers may not add to totals due to rounding.

Source:

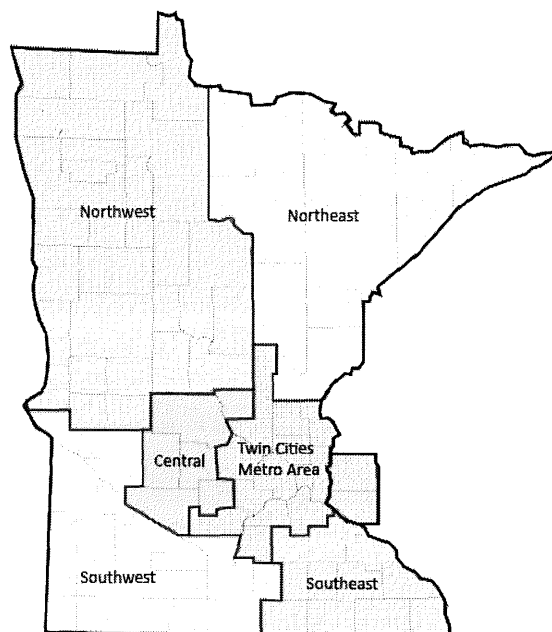
From Admin contract data.

|                              | Dollars<br>(millions) | Percent of<br>dollars |
|------------------------------|-----------------------|-----------------------|
| <b>Construction</b>          |                       |                       |
| Minnesota                    | \$ 475                | 94 %                  |
| Other regions                | 31                    | 6                     |
| Total                        | \$ 506                | 100 %                 |
| <b>Professional services</b> |                       |                       |
| Minnesota                    | \$ 1,206              | 76 %                  |
| Other regions                | 388                   | 24                    |
| Total                        | \$ 1,595              | 100 %                 |
| <b>Goods</b>                 |                       |                       |
| Minnesota                    | \$ 527                | 75 %                  |
| Other regions                | 172                   | 25                    |
| Total                        | \$ 699                | 100 %                 |
| <b>Other services</b>        |                       |                       |
| Minnesota                    | \$ 275                | 87 %                  |
| Other regions                | 40                    | 13                    |
| Total                        | \$ 315                | 100 %                 |
| <b>Total</b>                 |                       |                       |
| Minnesota                    | \$ 2,483              | 80 %                  |
| Other regions                | 632                   | 20                    |
| Total                        | \$ 3,115              | 100 %                 |

Based on this information, Keen Independent determined that Minnesota and two counties in Wisconsin (Pierce and St. Croix) should be selected as the relevant geographic market area for Admin construction, professional services, goods and other services contracts (see Figure 4-8). Therefore, Keen Independent's availability analysis focused on firms with locations that area. The quantitative analyses of marketplace conditions in Chapter 5 also included data for Minnesota and the two Wisconsin counties (or just Minnesota if only state-wide data were available).

Note that Figure 4-8 also shows subregions of Minnesota used in coding location of Admin construction contracts and other location-specific contracts.

Figure 4-8.  
Minnesota Joint Disparity Study regions



## CHAPTER 5.

### Conditions in the Minnesota Marketplace

Many studies have indicated that there is not a level playing field for minorities and women, and minority- and women-owned businesses, in the Minnesota marketplace.<sup>1</sup> In addition, federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, barriers to the formation of minority-owned construction businesses, and barriers to entry.”<sup>2</sup> Congress found that discrimination has impeded the formation and expansion of qualified minority- and women-owned businesses (MBE/WBEs).

Keen Independent analyzed quantitative and qualitative information to determine whether barriers currently exist in Minnesota. The study team examined the construction, professional services, goods and other services industries (the “study industries”) as well as data for the overall marketplace.<sup>3</sup>

Chapter 5 also examines information for persons with disabilities and veterans in Minnesota. The study team’s quantitative research regarding these two groups is less extensive than for minorities and women because of (a) more limited data and (b) the fact that programs for such businesses face less risk of successful legal challenge (see Chapter 2 and Appendix B).

Keen Independent organized Chapter 5 in six parts:

- A. Composition of the Minnesota workforce and business owners;
- B. Entry and advancement within study industries;
- C. Business ownership;
- D. Access to capital, bonding and insurance;
- E. Success of businesses; and
- F. Summary.

Quantitative information in Chapter 5 comes from U.S. Bureau of the Census data, other federal sources and the availability survey conducted as part of the Joint Disparity Study. Appendices E through I provide supporting information.

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<sup>1</sup> For example, see Minnesota State Demographic Center. The Economic Status of Minnesotans, January 2016. [https://mn.gov/admin/assets/the-economic-status-of-minnesotans-chartbook-msdc-jan2016-post\\_tcm36-219454.pdf](https://mn.gov/admin/assets/the-economic-status-of-minnesotans-chartbook-msdc-jan2016-post_tcm36-219454.pdf) (first accessed October 14, 2017); Myers, Jr., Samuel, Won Fy Lee and Jermaine Toney. 2015. “Responsible Banking in the Twin Cities,” Roy Wilkins Center for Human Relations & Social Justice, Humphrey School of Public Affairs, University of Minnesota; AAUW. 2017. “The Simple Truth about the Gender Pay Gap.” [http://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The-Simple-Truth](http://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth) (first accessed October 15, 2017).

<sup>2</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d, 970 (8<sup>th</sup> 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 (9<sup>th</sup> Cir. 2005).

<sup>3</sup> Appendix I identifies the business types grouped into each study industry when using American Community Survey data.

The study team conducted in-depth interviews, surveys, focus groups and public forums that obtained input from 2,480 business owners and other individuals. The input also included comments received through the study website, dedicated email address, telephone hotline and comment cards collected during public forums. The study team also reviewed input from one MnDOT and two City of Minneapolis listening sessions attended by Keen Independent. Appendix J provides a summary of the qualitative information collected in the study.

## **A. Composition of the Minnesota Workforce and Business Owners**

Keen Independent examined marketplace conditions for groups eligible for certain business assistance programs operated by participating entities.

**Groups examined in this study.** Participating entity programs provide benefits to businesses owned by certain racial and ethnic minority groups, women, persons with disabilities and veterans.<sup>4</sup>

**Racial and ethnic minority groups.** State and local programs that assist minority-owned businesses often examine four groups — businesses owned by African Americans, Asian Americans, Hispanic Americans and Native Americans.

Although Keen Independent's analysis of marketplace conditions in Minnesota generally follows these groupings of race and ethnicity, the study team recognizes the additional diversity among people of color in Minnesota. For example:

- Somali Americans and other people whose families immigrated from Africa in recent decades are a significant portion of the state's residents;
- The largest groups of Asian-Pacific Americans in Minnesota are Hmong Americans, Vietnamese Americans, Chinese Americans, Korean Americans and Filipino Americans, each with very different backgrounds and experiences;
- Asian Indians are also a large cultural group living in the state according to the Minnesota State Demographic Center;
- Mexican Americans are the largest group within the Latino population, but people from Puerto Rico as well as South and Central America are also Minnesota residents; and
- The Ojibwe and Dakota cultural groups are the largest American Indian populations in the state.<sup>5</sup>

And, beyond race, personal characteristics such as religion, language and whether an individual is a recent immigrant may affect opportunities for people of color.

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<sup>4</sup> However, Hennepin County solely operates race- and gender-neutral programs for its locally-funded contracts.

<sup>5</sup> Minnesota State Demographic Center. The Economic Status of Minnesotans, January 2016. [https://mn.gov/admin/assets/the-economic-status-of-minnesotans-chartbook-msdc-jan2016-post\\_tcm36-219454.pdf](https://mn.gov/admin/assets/the-economic-status-of-minnesotans-chartbook-msdc-jan2016-post_tcm36-219454.pdf). Accessed October 14, 2017.

The 2017 Joint Minnesota Disparity Study, by necessity, does not capture the rich diversity within the five racial and ethnic groups often considered when determining eligibility for participation in minority business programs. There are several reasons for this.

- Data sources such as the American Community Survey (ACS) conducted by the U.S. Bureau of the Census do not provide sufficient sample sizes to describe economic conditions for business owners within each of the 17 major cultural groups found in Minnesota Demographic Data Center reports. For example, very small sample sizes in the ACS for Native Americans in Minnesota make it difficult to describe outcomes for Native American business owners as a whole, let alone specific cultural groups.
- When examining ACS and other data for business owners within specific industries, sample sizes become even smaller. For example, the ACS has data for only 23 people of color who own goods firms (see Appendix H).
- When presenting quotes from interviews in Appendix J, Keen Independent uses the five groups to describe the race and ethnicity of a business owner interviewed for the study. Further specificity might make the interviewee easily recognizable, especially when his or her type of business and its location are also described.
- Participating entities that operate race-conscious programs examine whether or not a specific minority group will be eligible according to the four or five groups described above, not individual subgroup.
- Courts generally examine the evidence of discrimination for the groups described above without requiring more detailed information by subgroup (see Appendix B).

In sum, Chapter 5 and supporting appendices provide an overview of conditions for major racial and ethnic minority groups in Minnesota, and sometimes need to report results for minority-owned businesses in aggregate. These constraints do not affect the applicability of the study.

**Women.** The State of Minnesota TG program defines “women” as people of the female gender. The American Community Survey, which is the source of much of the information in Chapter 5, reports data based on sex. Individuals in the availability survey and in-depth interviews self-identified gender, which was used in the analysis of female-owned businesses from these sources.

Note that analysis of availability survey results compares three groups of businesses: those owned by minorities (including men and women), those owned by white females, and majority-owned firms. Keen Independent chose this approach in order to isolate any gender differences. In this chapter, “WBEs” refers to white women-owned business enterprises.

**Persons with disabilities.** The study team analyzed Census data for persons with disabilities in the state who are workers and who own businesses. The State of Minnesota TG program includes persons with a substantial physical disability, which is further defined as a physical impairment that substantially limits one or more major life activities. Keen Independent identified a U.S. Bureau of Census definition in the American Community Survey that closely matched the State definition.

**Veterans.** The study team also examined data for veterans and veteran-owned businesses based on American Community Survey data for veterans. Data are for all veterans regardless when the individual served in the military.

**Representation of minorities, women, persons with disabilities and veterans within the Minnesota workforce.** Analysis of American Community Survey data allows Keen Independent to compare the representation of minorities and women among study industry business owners with a benchmark based on overall composition of the Minnesota workforce. Study industries are construction, professional services, goods and other services. (See Appendices E and F for more information.)

**Racial and ethnic minorities.** The study team examined the representation of minorities among workers and business owners in Minnesota based on 2011-2015 American Community Survey data from the U.S. Bureau of the Census. Figure 5-1 on the next page presents demographic characteristics of the labor force as a whole and for business owners in the study industries. As shown, 15 percent of Minnesota workers were racial or ethnic minorities:

- African Americans were 5 percent;
- Hispanic Americans were 4 percent;
- Asian-Pacific Americans were 4 percent;
- Native Americans were 1 percent; and
- Subcontinent Asian Americans were 1 percent of total workers.

The ACS data also include information about whether an individual is a business owner. Figure 5-1 shows that minorities were 9 percent of Minnesota construction, professional services, goods and other services business owners. Each minority group made up a smaller share of business owners in these industries than what might be expected based on representation in the overall workforce.

**Women.** Figure 5-1 also reports the representation of women among all workers and study industry business owners in 2011 through 2015 in Minnesota. Women accounted for 48 percent of the Minnesota labor force and 18 percent of business owners in the study industries.

**Persons with disabilities.** The bottom portion of Figure 5-1 examines the representation of persons with disabilities among workers and study industry business owners in Minnesota. In 2011 through 2015, 4 percent of Minnesota workers and 5 percent of study industry business owners were persons with disabilities. Persons with disabilities were more likely than other workers to be business owners in study industries.

**Veterans.** Veterans were 5 percent of workers across industries and 8 percent of businesses owners in the study industries in 2011 through 2015.



Figure 5-1.

Demographic distribution of the workforce and business owners in Minnesota, 2011-2015

| Minnesota                   | Workforce in<br>all industries | Business owners in<br>study industries |
|-----------------------------|--------------------------------|--|
| <b>Race/ethnicity</b>       |                                |  |
| African American            | 5.2 %                          | 2.1 %                                  |
| Asian-Pacific American      | 3.7                            | 1.6                                    |
| Subcontinent Asian American | 0.9                            | 0.4                                    |
| Hispanic American           | 4.3                            | 3.8                                    |
| Native American             | 1.2                            | 1.0                                    |
| Other minority              | 0.1                            | 0.1                                    |
| Total minority              | 15.4 %                         | 9.0 %                                  |
| Non-Hispanic white          | 84.6                           | 91.0                                   |
| Total                       | 100.0 %                        | 100.0 %                                |
| <b>Gender</b>               |                                |  |
| Female                      | 47.9 %                         | 18.1 %                                 |
| Male                        | 52.1                           | 81.9                                   |
| Total                       | 100.0 %                        | 100.0 %                                |
| <b>Disability</b>           |                                |  |
| Persons with disabilities   | 3.9 %                          | 5.2 %                                  |
| All others                  | 96.1                           | 94.8                                   |
| Total                       | 100.0 %                        | 100.0 %                                |
| <b>Veteran status</b>       |                                |  |
| Veteran                     | 5.4 %                          | 8.3 %                                  |
| Non-veteran                 | 94.6                           | 91.7                                   |
| Total                       | 100.0 %                        | 100.0 %                                |

Note: For workforce in all industries, n = 148,582.

For business owners in study industries, n = 6,993.

Source: Study team from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Minority women, veterans who are disabled, and other data for business owners. The study team also examined the overlap of certain groups shown in Figure 5-1 (data not shown in the table).

Overall, 18 percent of study industry businesses were owned by women based on ACS data. Female-owned businesses represented smaller percentages of firms owned by African Americans (13%) and by Native Americans (12%). Women accounted for nearly 40 percent of Asian American business owners. Among Hispanic American-owned firms, 23 percent were women-owned.

One-quarter of businesses owned by persons with disabilities were veteran-owned. Ten percent were women-owned and 7 percent were minority-owned.

In Minnesota, veterans who own businesses are typically non-Hispanic white (96%) and male (98%). Persons with disabilities accounted for 18 percent of veterans who owned businesses, much higher than the 5 percent found overall.

## **B. Entry and Advancement within Study Industries**

The analysis of the Minnesota workforce discussed above was for all industries in the state. The study team also examined the representation of minorities and women among workers in the Minnesota construction, professional services, goods and other services industries. In construction, Keen Independent reviewed whether minorities and women working in the industry were employed in specific trades and advanced into supervisory and managerial roles. Appendix E presents detailed results.

In general, certain minority groups and women are underrepresented among workers in many of the study industries. In addition, minorities and women appear to face barriers regarding advancement to supervisory or managerial positions in the Minnesota construction industry.

Because individuals who form businesses worked in their respective industries before starting businesses, any barriers related to entry or advancement may result in fewer people of color and women owning businesses in those industries.

**Quantitative information concerning entry into construction, professional services, goods and other services industries in Minnesota.** As presented previously in Chapter 5, racial and ethnic minorities account for 15 percent of the state workforce and women are nearly one-half of Minnesota workers (48%). Opportunities for employment do not appear to be equal across industries, however.

Research concerning the Minnesota construction industry provides an example.

- The Minnesota construction workforce was 92 percent non-Hispanic white and 92 percent male, unlike the overall makeup of the Minnesota workforce shown in Figure 5-1.
- Far fewer African Americans and Asian Americans worked in the Minnesota construction industry than what might be expected based on composition of the overall workforce. African Americans were just 1.5 percent of the construction workforce compared with more than 5 percent in other industries. Asian Americans were 0.6 percent of the construction workforce compared with 4.8 percent in other industries. Employment of Hispanic Americans in the construction industry was similar to other industries combined.
- Many construction trades appeared to be almost exclusively white workers. Among the nearly 20 construction trades examined in this study, representation of people of color only reached that of other industries in three trades: roofing, painting and drywall.

- Women were 8 percent of people working in the Minnesota construction industry, but broken down by trade, most occupations had 4 percent or fewer female workers. There were eight trades examined in this study in which there were no women among the 659 employees in the ACS sample data for those trades (see Appendix E).
- And, once a person of color or woman enters the Minnesota construction industry, data also suggest unequal opportunities for advancement.<sup>6</sup>

Keen Independent identified certain disparities in employment for minorities and women in professional services, goods and other services as well.

- Even after controlling for having a college degree (frequently required in the professional services industry), fewer African Americans worked in the Minnesota professional services industry than what might be expected. Employment of women in the professional services industry was also substantially below what might be expected from the relative number of women with college degrees.
- Fewer African Americans, Asian Americans, Hispanic Americans and Native Americans worked in the Minnesota goods industry than what might be expected based on the overall workforce. Women were also underrepresented among people working in the goods industry.
- Representation of people of color was higher in the other services industry than in other industries in the state workforce, particularly for African Americans and Hispanic Americans. Employment of women, however, was much lower than in other industries.

The statistical evidence indicates that there is not a level playing field for minorities and women who might enter and try to advance as employees in the construction, professional services and goods industries in Minnesota (and for women concerning the other services industry). This reduces the number of minorities and women who are potential business owners in the study industries.

**Qualitative information about entry and advancement.** Keen Independent collected qualitative information about entry and advancement in the Minnesota construction, professional services, goods and other services industries through surveys, interviews, focus groups, public forums and other means described at the beginning of Chapter 5.

Many interviewees indicated that companies are typically started by individuals with connections to the particular industry. Business owners often reported they worked in their industry before starting a company. Therefore, the number of businesses owned by minorities and women in the construction, professional services and goods and other services industries in Minnesota are likely affected by barriers that exist in the Minnesota market to becoming employed in those industries.

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<sup>6</sup> In 2011-2015, 8 percent of workers in the construction industry were minorities but only 4 percent of supervisors were minorities. Women held 8 percent of jobs in the industry but only 3 percent of supervisor jobs. There appeared to be lower rates of reaching a manager position for African Americans, Hispanic Americans and Native Americans. Although the rate was lower for women compared with men, the difference was not statistically significant.

Some minority, female and white male interviewees described workplace conditions that are unfavorable to women and minorities.

- Several interviewees discussed their perceptions of discrimination in hiring, including exclusion of minority workers by only selecting white workers. Others reported racial comments being made.
- A number of women brought up the challenge of operating in “male-dominated fields.” An example of comments from women was, “People sometimes don’t understand ‘why I’m here.’” Another woman said, “I’m a woman in a man’s field .... There are those people who just don’t think that women should be out there.” Some interviewees reported sexual harassment and other inappropriate behavior toward women in their industries. “[At a business event] a guy shouts out, ‘Hey everybody, the blondes are mine!’”
- A few interviewees also explained that barriers in work environments can be more severe for immigrant women than immigrant men.

Many others reported that discrimination in Minnesota was more subtle, but still evident. An African American focus group participant reported that the “less blatant” discrimination, common to Minnesota, was as damaging as more blatant discrimination seen in other regions of the country.

**Effects of entry and advancement on the Minnesota construction, professional services, goods and other services industries.** The combined statistical and anecdotal information indicates evidence of barriers for minorities and women entering the Minnesota construction, professional services and goods industries and for women in the other services industry. There is also evidence of barriers to advancement for minorities and women in the Minnesota construction industry.

Such barriers negatively affect the number of minority- and women-owned businesses in these industries because employment is often a precondition to business ownership in those industries. Overall, MBE/WBE availability in study industries may be lower than what it would be if there were a level playing field regarding employment in those industries.

Underrepresentation of certain minority groups and women as employees in an industry — particularly in supervisory and managerial roles — may perpetuate any beliefs or stereotypical attitudes that minority- or female-owned businesses may not be as qualified as majority-owned businesses. Any such beliefs may also be making it more difficult for minority and female business owners to win work in Minnesota, including work with participating entities.

## C. Business Ownership

Even if there were no barriers to entering the study industries for people of color and women, the playing field for an employee to start a business might not be level. Research studies across the country have found that the race, ethnicity and gender of someone working in an industry affects opportunities for business ownership. Figure 5-2 summarizes how courts have used such information — particularly from a form of statistical examination called “regression analysis” — when considering the validity of an agency’s race- or gender-conscious business assistance program.

### **Quantitative information about business ownership.**

The study team used 2011-2015 ACS data to examine whether there are differences in business ownership rates between minorities and non-minorities and between women and men in the Minnesota construction, professional services, goods and other services industries. In most cases, people of color working in each of these industries were less likely to own businesses than non-minorities. Women were also less likely to own businesses than men.

Keen Independent used regression analyses to statistically examine whether those racial and gender differences in business ownership rates persisted after accounting for other personal characteristics. The regression analyses showed that women working in construction, professional services, goods and other services were less likely to own businesses than men, even after accounting for various personal characteristics including education and age.

- For example, after statistically controlling for a number of gender-neutral factors, one-half as many women working in the construction industry owned businesses than similarly situated men.
- Also, compared with similarly situated non-minorities, substantially fewer African American and Asian-Pacific Americans working in the other services industry owned businesses.

Among persons with disabilities and veterans working in the Minnesota construction, professional services, goods and other services industries, rates of business ownership were similar to other groups, or were higher.

Figure 5-2.

Use of regression analyses of business ownership in defense of the Federal DBE Program

State and federal courts have considered differences in business ownership rates between minorities and women and non-Hispanic whites and males when reviewing the constitutionality of race- and gender-conscious programs. 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.

Using Survey of Business Owner data, Dr. Corrie and Dr. Myers found a high degree of underrepresentation of minority-owned firms in the Minnesota construction industry and wholesale trade industry, (which corresponds to the “goods industry”).<sup>7</sup> They did not find underrepresentation in the professional, scientific and technical services industry or the administrative and support industry.

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

**Qualitative information about business ownership.** Keen Independent collected qualitative information about any barriers to business ownership through in-depth interviews, availability surveys, public forums and other means.

Some business owners and trade association representatives indicated that successfully starting businesses was very difficult. Barriers securing start-up capital were discussed by many current business owners. One Hispanic American business owner said that he could understand why so many businesses fail given difficulties obtaining financing. (Access to capital is specifically discussed later in this chapter.)

Others said that everything was difficult. Lack of knowledge of business operations at start-up was mentioned by many individuals interviewed.

- One business owner said, “The challenges [to start-up were] learning how to run a business ... I wish I would [have] had at least two years of business [management experience] beforehand.”
- When asked about challenges she faced when she took over the business, one woman said, “It’s a lot .... You do not know what you do not know.”

Some interviewees indicated that it was more difficult to start a business as a minority or a woman.

- For example, after starting her business, “Being a woman and being Native, I ran into implicit bias constantly.” She said this was a common barrier for minorities and women starting businesses.
- Some individuals discussed the difficulty of starting a business and being successful when they were one of the only minorities in a particular field. One interviewee said, “I am one of only two African Americans in the whole of United States that I know of that’s nationally certified to do what I do.” He remarked, “There’s a lot of private work that we don’t get because ... we’re not white.”

People of color who were also immigrants to the United States discussed additional challenges of gaining entry into U.S. business culture. Some reported language issues. A representative of a trade association serving minority immigrant businesses said that his members are very interested in pursuing the “American Dream,” yet there is still a lack of information as to how to do so.

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<sup>7</sup> Corrie, Bruce P. and Samuel Myers, Jr. 2015. Latest Data on Minority Businesses in Minnesota, 2015. University of Minnesota. <http://www.csp.edu/wp-content/uploads/MBE-2015-Latest-Data.pdf> (first accessed July 6, 2017).

**Effects of disparities in business ownership rates for minorities and women on the Minnesota construction, professional services, goods and other services industries.** The disparities in business ownership rates for certain minority groups and women mean that there are fewer minority- and women-owned firms in certain industries in Minnesota than there would be if there were a level playing field for minorities and women in the Minnesota marketplace.

Availability of women-owned firms, in particular, is lower than it would otherwise be in the Minnesota study industries if women working in those industries had the same rates of business ownership as similarly situated men. Similar results were evident for African Americans and Asian-Pacific Americans working in the other services industry in Minnesota.

#### **D. Access to Capital, Bonding and Insurance**

Access to capital is one of the key factors examined when researchers study business formation and success. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to go into business. Such barriers may also affect the likelihood of business survival or expansion.

There is evidence that minorities and women face certain disadvantages in accessing the capital necessary to start, operate and expand businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Keen Independent examined whether minority and female business owners (and potential business owners) have access to capital that is comparable to that of non-minorities and men. In addition, the study team reviewed information about whether minority- and women-owned firms face any barriers in obtaining bonding, which is closely related.

**Quantitative information about homeownership and mortgage lending.** Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses.

Keen Independent analyzed 2011-2015 American Community Survey data to determine if there were any differences in homeownership in Minnesota by racial and ethnic groups. The study team examined the potential impact of race and ethnicity on mortgage lending in Minnesota based on Home Mortgage Disclosure Act (HMDA) data for 2007, 2011 and 2015.

Key results include:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans, Asian Americans, Hispanic Americans and Native Americans in Minnesota own homes compared with non-Hispanic whites. Among those who own homes, African Americans, Hispanic Americans and Native Americans tend to have lower home values.
- High-income African American, Asian American, Native American and Native Hawaiian or other Pacific Islander households applying for conventional home mortgages in Minnesota were more likely than high-income non-Hispanic whites to have their applications denied.
- Before the collapse of the home mortgage market in the late 2000s, subprime loans accounted for a much larger share of the conventional home purchase and refinance loan issued to minority groups compared with loans going to non-Hispanic whites.

Research on the Twin Cities lending market by a team led by Dr. Myers of the University of Minnesota found unequal outcomes for minorities in the local mortgage lending market that could not be explained by the non-racial characteristics of the mortgage applicants.<sup>8</sup>

The U.S. Department of Justice has also taken action against alleged discrimination against minorities in Minnesota banking. In January 2017, it filed a lawsuit against KleinBank alleging that it had engaged in “redlining” of neighborhoods in the Twin Cities area that predominantly had minority residents. The complaint alleges that KleinBank’s discriminatory practices were intentional.<sup>9</sup>

In conclusion, there is substantial quantitative evidence of disparities in homeownership and home mortgage lending for people of color in Minnesota. Any past discrimination against minorities that affected the ability to purchase and stay in homes could have long-term impacts on the home equity available to start and expand businesses, the ability of minority business owners to access business credit, and access to bonding for construction business owners.

**Quantitative information about business credit.** Any race- or gender-based barriers in the application or approval processes of business loans could also affect the formation and success of MBE/WBEs.

**Information about business loans from the Survey of Small Business Finances.** Some of the past disparity studies for participating entities 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. The survey contains information on loan denial and interest rates by region of the country. Data from 2003 are the most recent available from the SSBF. (More recent national data are consistent with 2003 SSBF results.)

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<sup>8</sup> Myers, Jr., Samuel, Won Fy Lee and Jermaine Toney. 2015. “Responsible Banking in the Twin Cities,” Roy Wilkins Center for Human Relations & Social Just, Humphrey School of Public Affairs, University of Minnesota.

<sup>9</sup> *United State of America v. KleinBank*, No. 17-CV-136. (D. Minn. Jan. 13, 2017).



The 2010 City of Minneapolis Disparity Study concluded from these data that there were disparities in lending outcomes for African American- and Hispanic American-owned firms, as well as some evidence of disparities for other minority-owned firms. Disparities for minority-owned firms took several forms, including:

- Not applying for a loan because of fear of loan denial;
- Higher denial rates when firms applied for loans, even after controlling for factors such as firm size and credit history; and
- Higher interest rates paid when firms did receive a loan.<sup>10</sup>

That study also identified some evidence of discrimination against women in capital markets.

Keen Independent did not replicate the analysis of SSBF information in the 2010 City of Minneapolis study because the data analyzed are still the most current available.

Survey results from MBEs, WBEs and majority-owned businesses in Minnesota. As part of the availability surveys conducted in summer 2017, Keen Independent asked questions related to potential barriers in the local marketplace. The interviewer introduced these questions with the following: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past six years as you answer these questions.” For each potential barrier, Keen Independent examined the percentage of minority-owned, white women-owned and majority-owned companies indicating that they had experienced such difficulties.

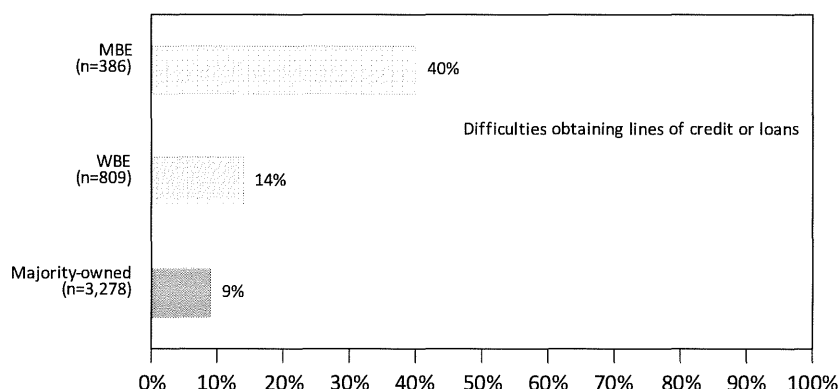
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<sup>10</sup> NERA, *The State of Minority- and Women-owned Business Enterprise: Evidence from Minneapolis*, Prepared for the City of Minneapolis, October 10, 2010.

The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” Figure 5-3 presents those results.

- Among minority-owned firms, 40 percent of respondents said they had experienced such barriers.
- Fourteen percent of white women-owned firms said “yes” when asked this question.
- Only 9 percent of majority-owned firms indicated difficulties obtaining lines of credit or loans.

Figure 5-3.  
Percent responding  
“yes” to, “Has your  
company  
experienced any  
difficulties in  
obtaining lines of  
credit or loans?” for  
MBEs, WBEs and  
majority-owned  
firms qualified and  
interested in public  
sector work



Source:  
2017 availability surveys.

Similar differences were found among availability survey respondents in construction, professional services, goods and other services. It appears that minority- and women-owned firms in the Minnesota study industries are more likely to experience difficulties in obtaining lines of credit or loans than majority-owned firms.

Exacerbating the impact of any barriers to obtaining lines of credit or loans, minority- and women-owned firms were more likely to report difficulties receiving payment from public agencies than majority-owned firms (see Appendix H).

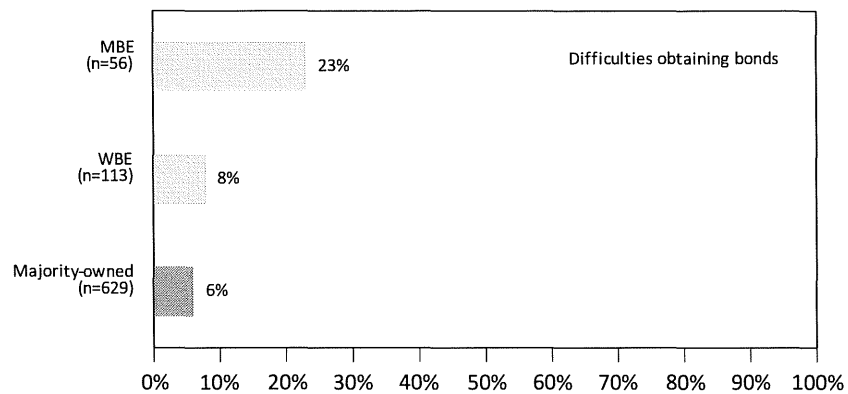
**Quantitative information about bonding.** As interviewees from construction firms and other businesses discussed with the study team, access to bonding is closely related to access to capital.

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 firms that had obtained or tried to obtain a bond for a project, 23 percent of MBEs and 8 percent of WBEs indicated difficulties obtaining bonds needed for a project compared with 6 percent of majority-owned firms. Figure 5-4 examines the percentage of firms in Minnesota reporting difficulties obtaining bonds among those that had obtained or tried to obtain a bond.

Figure 5-4.  
Percent responding  
“yes” to, “Has your  
company  
experienced any  
difficulties in  
obtaining bonds  
needed for a  
project?” for MBEs,  
WBEs and majority-  
owned firms  
qualified and  
interested in public  
sector work



Source:  
2017 availability surveys.

**Qualitative information about access to capital and bonding.** Keen Independent collected qualitative information about access to capital and bonding for businesses through in-depth interviews, availability surveys and public forums 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 especially when starting and first growing. Many reported using personal or family resources to finance their businesses, risking losing homes because they had to be used as collateral. “Being self-sufficient” was a typical comment about how small business owners coped with limited access to capital. An African American female business owner stated, “I only ever use my ‘personal resources’ ... I never considered borrowing.”
- Many business owners reported that obtaining financing continues to be a barrier for their businesses today.

- Some interviewees, including MBEs, WBEs and majority-owned firms, reported that slow payment on contracts and subcontracts led to an increased need for business capital and financing. One trade association representative said that contractors sometimes have to wait anywhere from 60 days to two years to receive payment. He commented that many subcontractors have to finance their projects for the first 60 to 90 days as they will not be paid by the general contractor on time. A number of interviewees said that public sector customers are especially slow pay. Some said that they specifically needed lines of credit to handle slow pay by public agencies. Retainage held by public agencies was also an issue.

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

- “They won’t give black folks a loan,” was one of many comments made by African American business owners and trade association representatives. Some people of color discussed how they attempted to obtain financing and experienced challenges that they believed were due to their race.
- Female business owners reported what appeared to be unequal treatment by banks as well. Appendix J includes reports of demeaning treatment of women by financial institutions when they attempted to obtain credit.

If business size and personal net worth are affected by race or gender discrimination, such discrimination also impacts 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 larger contracts.

- The African American male owner of a specialty services firm said “Most of the minorities, based on my knowledge ... don’t have [enough financing] to start the business in the first place. So, [limited access to financing] is a big factor that is really impeding their progress.”

**Bonding.** For state and local agency construction contracts, surety bonds are typically required to bid on projects. Sometimes prime contractors require subcontractors on a project to have bonds.

In order to obtain a bond, businesses must provide company history and evidence of financial strength to a bonding company. The bonding company uses this information to determine whether to issue a bond of a particular size. Consequently, any reduced access to capital may negatively impact the ability to obtain a bond. Bonding companies also use different ratios to calculate bonding capacity and they charge different rates based on a number of factors, which can affect the cost-competitiveness of a firm’s bids.

According to business owners and other individuals interviewed:

- Many MBEs, WBEs and other small construction companies cannot obtain the necessary bonding to bid on public 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 where primes are willing to “carry” the subcontractors.
- Bonding is linked to company assets, and according to some interviewees, a personal guarantee can be required. One trade representative said that bonding is a barrier for small businesses, and that a business owner is often guaranteeing the bond with their house as collateral.
- Many interviewees talked about the self-reinforcing barriers of limited capital, unequal access to financing, and then having the work you bid on be dictated by being able to obtain a bond. Some reported that borrowing was actually easier than bonding.
- One interviewee specifically linked requirements for bonding with race or gender discrimination. For example, “The dominant white culture set these things [bonding requirements] up out of prejudice ....”

**Effects of access to capital and bonding on the Minnesota construction, professional services, goods and other services industries.** Potential barriers associated with access to capital and bonding may affect business outcomes for MBE/WBEs compared to majority-owned firms.

- Well-capitalized businesses are, in general, more successful than other businesses.
- For state and local government construction contracts and certain other contracts, bonding is required to bid as a prime contractor. Interviewees report that these requirements affect subcontractors as well.
- A company must also have considerable working capital to complete certain types of public sector contracts or subcontracts, especially if there are delays in payment on that contract (which some businesses experience).
- Compared with majority-owned firms, MBE/WBEs in Minnesota are disproportionately small. Obtaining business financing and bonding can be more of a barrier to small businesses than large businesses. The effect of such barriers is to make it less likely that a small firm can expand or successfully pursue public sector work.
- To obtain bonding, a company must have financial strength. Any barriers to accessing capital can affect a company’s ability to obtain a bond of a certain size. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms.

- There is quantitative evidence that minorities do not have the same personal access to capital as non-minorities, which affects personal financial resources. Personal net worth and financial history can affect access to business loans and bonding in Minnesota.

## E. Success of Businesses

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of majority-owned businesses in the Minnesota construction, professional services, goods and other services industries. The study team examined:

- Rates of business closures, expansion and contraction;
- Business receipts and earnings;
- Relative bid capacity; and
- The proportion of MBEs, WBEs and majority-owned firms in Minnesota indicating that they have experienced specific barriers in the marketplace (from the 2017 availability survey).

In addition, the study team analyzed business owner earnings for persons with disabilities and for veterans. Appendix H provides detailed results about these quantitative analyses.

Analysis of business success, and any related barriers, included qualitative information from interviews and surveys with business owners and others. Comments from public forums and other avenues were also analyzed by the study team. (Appendix J reviews this qualitative information.)

**Quantitative analysis of business closure, expansion and contraction.** Based on U.S. Small Business Administration analyses for 2002 to 2006 for Minnesota, African American-, Hispanic American- and Asian American-owned firms were more likely to close than non-Hispanic white-owned businesses.

There were also differences in the proportion of firms that expanded during this time period. In Minnesota, African American- and Hispanic American-owned firms were more likely to expand than non-Hispanic white-owned firms, which might indicate relative success for those firms that did not close over that time period.

**Quantitative analysis of business receipts and earnings.** Keen Independent examined business earnings data from federal data sources and the 2017 availability surveys with Minnesota businesses. The data for annual revenue pertained to 2012, 2011 through 2015 and 2014 through 2016.

Most data sources indicated disparities in annual revenue for minority- and women-owned firms compared with majority-owned firms.

As an example, Figure 5-5 shows average earnings for minority and female business owners in Minnesota study industries using 2011 through 2015 data from the American Community Survey. Overall, earnings of people of color who owned businesses (\$34,144) were slightly less than non-minority business owners (\$37,926), which was not a statistically significant difference given the sample sizes for the two groups in the data. (However, additional analyses in Appendix H show large disparities between minority and non-minority businesses owners in construction and professional services).

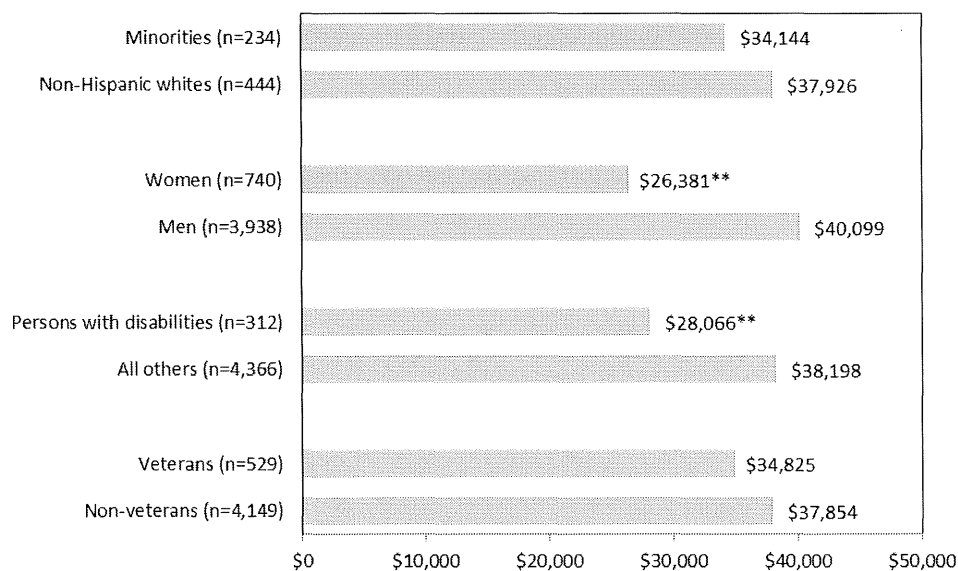
Using the same data, the study team found that female business owners earned substantially less than male business owners in the Minnesota study industries (\$26,381 compared with \$40,099), and that this difference was statistically significant.<sup>11</sup>

The study team was also able to analyze 2011-2015 U.S. Bureau of the Census data concerning business owner earnings for persons with disabilities and for veterans:

- In Minnesota, persons with disabilities who owned businesses had lower business earnings on average (\$28,066) than other business owners (\$38,198).
- Veterans who owned businesses had somewhat lower business earnings than non-veterans (not a statistically significant different).

Figure 5-5.

Mean annual business owner earnings among all study industries, 2011 through 2015, Minnesota



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 2015 dollars.

Source: Study team from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

<sup>11</sup> "Statistically significant" means that one can be confident that random chance in the sampling of the data can be rejected as the cause of the apparent difference.

The study team further examined whether education, age or other personal characteristics compiled in the American Community Survey could explain the large differences in business earnings between female and male business owners. “Regression analysis,” a statistical technique that can isolate the apparent effects of multiple characteristics at the same time, was used to research whether these gender differences remained after accounting for other personal characteristics. In each of the study industries in Minnesota, women earned less than similarly-situated men who owned businesses (see Appendix H for detailed results).

Data from availability surveys conducted for this study showed that, across the construction, professional services, goods and other services industries in Minnesota, MBEs and WBEs were more likely to be low-revenue firms and less likely to have annual revenue of \$15 million or more compared with majority-owned firms. For example, 9 percent of majority-owned professional services firms surveyed in Minnesota reported annual revenue above \$15 million per year compared with 2 percent of minority-owned companies and 1 percent of white women-owned businesses.

Dr. Corrie and Dr. Myers have found similar disparities between the average revenue of minority- and women-owned companies and non-minority-owned businesses in Minnesota.<sup>12</sup>

**Bid capacity.** Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.<sup>13</sup>

Keen Independent directly measured bid capacity in its availability survey through questions about largest contracts or subcontracts awarded or bid on by a firm. With these data, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on.

The study team measured “relative bid capacity” for a business as the largest contract or subcontract that the business performed or reported that they had bid on in the past six years.

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<sup>12</sup> See, for example, Corrie, Bruce P. and Samuel Myers, Jr. 2015. Latest Data on Minority Businesses in Minnesota, 2015. University of Minnesota. <http://www.csp.edu/wp-content/uploads/MBE-2015-Latest-Data.pdf> (first accessed July 6, 2017).

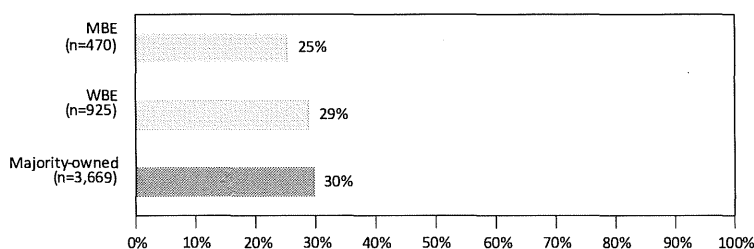
<sup>13</sup> For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).



Keen Independent then compared firms within specific subindustries to determine whether or not a firm had similar bid capacity to other businesses in its specialization or whether it had “above average” bid capacity compared to other businesses.<sup>14</sup>

- About 25 percent of MBEs had above median bid capacity for their subindustry compared with 29 percent of WBEs and 30 percent of majority-owned firms.
- Although the difference between results for MBEs and majority-owned firms was relatively small, they were still evident after also controlling for length of time in business.<sup>15</sup>

Figure 5-6.  
Percent of firms above  
median bid capacity for their  
subindustry, Minnesota, 2017



Source:

Keen Independent Research from 2017  
availability interviews.

#### Quantitative analysis of telephone survey results concerning potential barriers.

Keen Independent’s availability surveys of Minnesota businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business. The availability interviews suggest that relatively more minority- and women-owned firms report difficulties across a broad set of aspects of operating a business in Minnesota.

Answers to questions concerning marketplace barriers in the availability survey indicated the relatively more MBEs and WBEs than majority-owned firms face the following barriers:

- Being prequalified for work (among professional services firms);
- Insurance requirements (among professional services firms);
- Large project sizes;
- Learning about bid opportunities in the public and private sectors, and with prime contractors;
- Obtain supplier/distributorship relationships (construction firms); and
- Competitive disadvantages due to pricing from suppliers (construction firms).

<sup>14</sup> Keen Independent measured “above median” bid capacity as the survey asked about size ranges of largest contracts awarded or bid on. For example, the biggest contract most firms in the electrical contracting industry in Minnesota had been awarded or bid on was in the \$100,000 to \$500,000 size range, or lower. Any firm that reported being awarded or bidding on a contract of more than \$500,000 was “above median bid capacity.”

<sup>15</sup> Keen Independent developed a regression model of whether a firm had above median bid capacity for its subindustry that included as independent variables MBE status, WBE status and age of firm. The difference for MBE status was statistically significant at the 90 percent confidence level.

Relatively more MBEs than other firms reported difficulties concerning:

- Insurance requirements on projects (among construction, goods and other services firms);
- Being prequalified for work (among construction firms);
- Receiving payment from public agencies;
- Receiving final approval on work;
- Brand name specifications; and
- Obtaining supplier and distributorship relationships (goods firms).

For example, when Minnesota goods and other services firms were asked if they had difficulties learning about bid opportunities directly with public agencies, “yes” responses were the following:

- 48 percent of minority-owned firms;
- 30 percent of white women-owned businesses; and
- 23 percent of majority-owned firms.

Results were similar when firms were asked about any difficulties learning about bid opportunities in the private sector.

There were some questions about potential barriers where the percentages of firms reporting such difficulties showed little difference between MBEs, WBEs and majority-owned firms (for example, more than one-quarter of MBE, WBE and majority-owned construction firms reported difficulty getting paid by prime contractors).

**Qualitative information about success of businesses.** In-depth personal interviews, availability surveys, public forums and other information sources provided information about the success of businesses and any barriers firm owners face.

**Fluid employment size and types of work.** Interviewees explained that firms 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.

**Importance of business relationships.** Existing relationships are an important factor in finding opportunities to bid on work according to many companies. Interviewees frequently reported the following:

- Some business owners reported relying on word-of-mouth relationships for work. A public sector representative emphasized relationship-building as key, “build a relationship beforehand ... If done at the time of bid, it’s too late.”
- “Being at the table” is important. Comments such as “I’m not even sitting at the table” were common.
- Some conveyed that relationship-building takes years and years. A supply firm commented that “it’s not overnight ... it took years to build the right relationships.”
- Incumbents in public sector contracts are difficult to dislodge. One goods provider said that “leadership” is welcoming but “purchasing staff” are not. Another commented that relationships built at the diversity department are overruled at Procurement.
- Prime contractors take price into consideration when selecting a subcontractor, but the previous relationships they have 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. “Primes want to work with subs they know” was a typical comment. One owner of a minority-owned business said the primes often give the work to “buddies.” Some certified business owners reported only getting opportunities as a subcontractor when there were contract goals.
- Some interviewees reported that prime contractors sometimes “shop” a subcontractor’s bid, so even priced-based selection of subcontractors is not always fair. For example, a non-profit trade association reported witnessing bid shopping where a general contractor identified a low bidder and gave the information to another favored business.

Many minority, female and white male interviewees reported the presence of a “good ol’ boy” network in Minnesota that negatively affects opportunities for minority- and women-owned firms. For example:

- “It’s about who you know” was a frequent comment, sometimes linked to closed networks. One chamber representative said, “A lot of this goes back to the ‘good ol’ boys’ club ... it’s about who you know.”
- A minority specialty services provider said that “good ol’ boys” reach out to their network “before coming down to the minorities.”

- One owner of certified specialty contracting firm reported he is competing against closed networks of “cousins and brothers.” Another business owner said that it can be difficult for minority-owned firms to break into the industry, adding, “When the job comes available ... the project manager or the supervisor on that job ... has a ‘buddy-buddy’ that they have to do the job.”
- Several businesses indicated that “good ol’ boy” networks spilled over from work environments to experiences with chambers, boards and other business associations. For example, a chamber representative reported that, for open seats, the board members recommended people they already knew, “white men who do similar work.”

Some business owners reported “professional networks” and long-standing relationships as positive, or that closed networks were less of a problem today than they were in the past.

**Disadvantages for small businesses.** Many interviewees indicated that small businesses are at a disadvantage when competing for public sector work in Minnesota.

- For many of the reasons discussed above, small businesses including MBE/WBEs said that it was difficult to establish relationships with customers and prime contractors.
- Access to financing can be affected by business size, as well.

In addition, owners and managers of small businesses reported that public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work.

- It is more difficult for smaller firms to market and identify contract opportunities. The first challenge for many small businesses, with limited time and resources, is to navigate state government in Minnesota “to reach out to the departments, to find the list of people to talk to.”
- Small construction businesses seeking prime contracting and subcontracting work face barriers due to public sector bonding requirements.
- Excessive paperwork and “red tape” that often come with public sector work are extra burdens to small businesses. One certified MBE reported that they stopped bidding public sector jobs because the procurement process is time-consuming and his firm rarely has enough time to propose.
- Large size and scope of public sector contracts and subcontracts present a barrier to bidding. Some business owners said that they would benefit from smaller contracts, or if the specialty work they perform was broken out from larger contracts. One said, “Being small, we are limited to the size of contracts we can get.”

- Public sector insurance requirements are a barrier to businesses seeking public sector prime contracts and subcontracts. One business owner, for example, “You have to pay the premiums that exceed the limits of a normal policy ... it takes away from our profitability.”
- Interviewees indicated that public agencies favor bidders and proposers they already know and have bidding protocols in place that exclude new businesses from bidding. For example, one business owner reported, “I would see projects where it says you have to have two projects in the last 18 months that were \$50,000 and over. For a small business and a minority business that’s not ‘gonna’ happen.”
- Public agency screening of firms through prequalification can be a barrier to bidding based on the interviews. One interviewee reported, “We’ve been in business since the 80s ... the biggest hurdle is trying to qualify for prequalification on state contracts.”
- Slow payment or non-payment by owners or by prime contractors can be especially damaging to small businesses and represent a barrier to performing that work. (Some interviewees reported that they do not have sufficient capital to wait to be paid when working on large contracts.) One interviewee said that slow payment could “derail” a small low-income business. Some interviewees said that slow payment of subcontractors is sometimes due to onerous retainage policies of public sector agencies.
- Other interviewees said that primes sometimes do not quickly pay subcontractors even after getting paid on time by the public entity. Several reported never being paid by a prime or public entity for work performed, or that there is “favoritism” in what firms get paid and when.

Data show that MBE and WBE firms in Minnesota are 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.

**Evidence of stereotyping and other race and gender discrimination.** In the in-depth interviews, availability surveys and other information the study team analyzed as part of the study, some interviewees indicated difficulties for minorities and women other than those associated with being a small business.

There was some evidence that some prime contractors or customers held negative stereotypes concerning minority- and women-owned firms.

Some interviewees said that people “behave differently” because of their race or gender as a business owner.

- Some interviewees reported that the stereotype is that MBEs/WBEs and other small businesses “will not deliver.” Some interviewees said that they constantly had to “prove themselves” because they were minority or female business owners. A trade association representative said that there was a “constant vigilance” with minority-owned firms being held to “unfair expectations or unexplained expectations.” He added that many minority firms failed as a result.
- Both minority and female business owners said that customers or prime contractors will go to others within their companies for answers. “I’ve had countless contractors, project managers, customers ... not trusting that I gave them the right answers because I was a woman ....” A number of women had comments such as, “There can be a dismissive quality.” Some women said that men will express surprise that “a woman could know that much about [anything].”
- Some minority and female business owners said that they are “tested” by others “just to see how far they can manipulate you.” One reported that this led to “definitely more pressure.”
- One business owner said that, regarding a general contractor or project manager, “... you hear lots of comments about ‘we have a well-oiled machine here,’ and, ‘... you’re going to mess the project up because you’re not part of their ... club of people that they always want to use.’”
- A certified minority business owner said that as the “only people of color on a project ... questions were raised: ‘Did we pass criminal background checks?’ ... Those issues come up all the time.”
- Another certified minority business owner gave an example that one public entity in Minnesota perpetuates the myth that minority contractors “cannot do things right.”
- One minority business owner of a goods business related that to circumvent barriers “you don’t always want people to know it’s a minority-owned business.”

Appendix J provides views from business owners and managers, trade association representatives and others.

Comments that the playing field is tilted *toward* minorities and/or women. When asked about whether there was a level playing field for minority- and women-owned businesses, there were some white male respondents who said the playing field “was tilted in their favor.”

Some minority men interviewed in the study stated that there was discrimination against minority-owned firms but not for women-owned firms.

Comments from persons with disabilities. When asked about any barriers to business success, persons with disabilities reported physical challenges that made operating a business more difficult. The study team included service-disabled veteran-owned businesses in these interviews. Appendix J provides detailed analysis of these comments.

Comments from veterans who are business owners. In general, business owners who are veterans did not discuss disadvantages other than being a small business. Most of the discussion from these business owners was how to make certification of veteran-owned businesses easier or include more contract goals for certified veteran-owned businesses. Appendix J summarizes comments from veteran-owned businesses.

**Summary concerning success of businesses in Minnesota.** Minority- and women-owned businesses in Minnesota are more likely to be small businesses than majority-owned businesses. Therefore, any disadvantages for small businesses disproportionately affect MBEs and WBEs.

Success in Minnesota marketplace depends on relationships with other individuals, including customers, suppliers, bankers, prime contractors and subcontractors, depending on the type of business. Some of the minority and female interviewees reported unequal access to these relationships, stereotyping and other unequal treatment based on their race or gender.

## **F. Summary**

As discussed in this chapter and supporting appendices, there is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in the Minnesota construction, professional services, goods and other services industries.

Such information is important when participating entities examine future operation of programs to assist such businesses.

Persons with disabilities and veterans in Minnesota are more likely than other groups to own businesses in the study industries. However, there is also evidence that persons with disabilities who own businesses earn less than other business owners in Minnesota. There were small differences in earnings for veterans who own businesses.

## **CHAPTER 6.**

### **Availability Analysis**

Disparity analyses compare the percentage of an entity's procurement dollars going to minority- and women-owned firms with what might be expected based on the relative availability of MBEs and WBEs for those procurements. Outcomes for minority- and women-owned firms, by MBE/WBE group, are compared with availability benchmarks for each group. Chapter 6 provides the availability benchmarks for the Admin procurements examined in this disparity study.

The availability results from Chapter 6 are used in Chapter 7 when comparing MBE/WBE utilization and availability for Admin procurements.

Chapter 6 describes the study team's availability analysis in seven parts:

- A. Overview;
- B. Definitions of MBEs, WBEs and majority-owned businesses;
- C. Information collected about potentially available businesses;
- D. Businesses included in the availability database;
- E. MBE/WBE availability calculations on a contract-by-contract basis;
- F. Overall availability results; and
- G. 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 Minnesota to conduct the MBE/WBE availability analysis for participating entities. Keen Independent surveyed firms that had previously expressed interest in participating entity procurements or were identified on other business lists in lines of work relevant to entity 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 5,000 total firms qualified and interested in procurement with the participating entities after screening the businesses responding to the survey.

This database, plus the database on Admin procurements (indicating type, size, location, year and other characteristics of each procurement), were the raw materials for developing availability benchmarks specific to Admin contracts.



To develop the MBE/WBE availability benchmark for Admin procurements, Keen Independent performed an availability analysis for each Admin 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 was 12 percent.

Keen Independent then had to aggregate the availability results for Admin's 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" MBE/WBE availability where the weight was the relative size of the individual procurement compared with the total procurement dollars examined.

Using this approach to calculating MBE/WBE availability for participating entity procurements is more supportable than using a simple "head count" of MBE/WBEs (i.e., simply calculating the percentage of all Minnesota businesses that are minority- or women-owned). The balance of Chapter 6 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 6-1 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 public entities in Minnesota (see Appendix B).

**Figure 6-1.**  
**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 participating entity procurements.

For example, the Keen Independent analysis included discussions with businesses about interest in public sector work in Minnesota, 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).

## **B. Definitions of MBEs, WBEs and Majority-owned Businesses**

The following definitions of MBEs, WBEs and majority-owned firms are useful background.

**MBE/WBEs 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 5 for a discussion of racial and ethnic groups included in minority-owned firms).

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.<sup>1</sup>

**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 Admin 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.

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

**Majority-owned businesses.** Majority-owned businesses are businesses that are not owned by minorities or women (including businesses owned by non-Hispanic white males or that have 50-50 ownership between men and women, and publicly-traded companies). Keen Independent consistently uses this definition in both the utilization and availability analyses.

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<sup>1</sup> 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.

### C. Information Collected about Potentially Available Businesses

Keen Independent's availability analysis focused on firms with locations in Minnesota and two counties in western Wisconsin (St. Croix and Pierce counties) that work in fields related to participating entity construction, professional services, goods and other services procurements. Below, we describe how we 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 participating entities as interested in learning about future work, such as registering with the State through SWIFT (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 Minnesota or the two Wisconsin counties within the Minneapolis-St. Paul MSA (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 participating entity procurements. Customer Research International (CRI) performed the surveys under Keen Independent's direction. Surveys began in spring and were completed in summer 2017.

**Online surveys.** For firms on the interested firms list (described above) that had email addresses, the State of Minnesota distributed a request to complete the online availability survey. A small portion of those contacted via email completed the online survey. One reason for this was that email addresses were provided for relatively few firms on the list. Firms not responding to the online survey were included in the telephone survey when phone numbers were available.

**Telephone surveys.** After completing the online phase of the survey, CRI used the following steps to complete telephone surveys with business establishments:

- CRI contacted firms by telephone.<sup>2</sup>
- Interviewers indicated that the calls were made on behalf of the State of Minnesota and other participating entities for purposes of expanding their lists of companies interested in performing their work.
- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in work with participating entities, so no further survey was necessary. (Such surveys were treated as complete at that point.)
- Up to four phone calls were made at different times of day and different days of the week to attempt to reach each company.

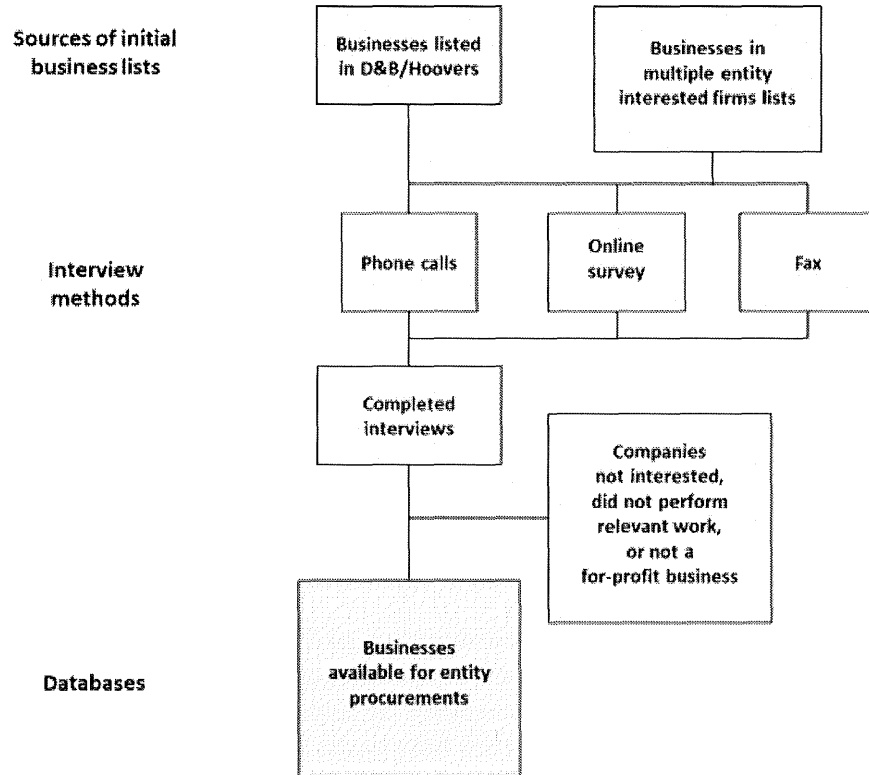
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<sup>2</sup>The study team offered business representatives the option of completing surveys via fax or email if they preferred not to complete surveys via telephone.

**Other avenues to complete a survey.** Even if a company was not directly contacted by the study team, business owners could complete a survey for their company through a link from the disparity study website or request and return a fax version of the survey.

Figure 6-2 summarizes the process for identifying businesses, contacting them and completing the surveys.

Figure 6-2.  
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 specific geographic regions (Twin Cities Metro Area and Northeast, Northwest, Central, Southeast and Southwest Minnesota);
- Largest prime contract or subcontract bid on or performed in Minnesota in the previous six years;
- Year of establishment; and
- Race/ethnicity and gender of firm owners.

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 participating entities, among other topics. Keen Independent considered businesses to be potentially available for participating entity procurements 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 public agencies in Minnesota, and for some types of work, whether they were interested in prime contracts and/or subcontracts.<sup>3</sup>

#### **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 participating entity procurements, but it should not be considered an exhaustive list of every business that could potentially participate in those contracts (see Appendix D).

After completing surveys with 20,527 businesses in Minnesota, the study team reviewed responses to develop a database of companies that are potentially available for participating entity work. The study team's research identified 5,064 businesses reporting that they were available for specific types of participating entity procurements and subcontracts. Of those businesses:

- 470 (9%) were minority-owned; and
- 925 (18%) were white women-owned.

Figure 6-3 on the following page 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.

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<sup>3</sup> Also, Keen Independent examined the combined entity contract data to determine whether firms received participating entity procurements. We coded the answer to question about whether they received past work as "yes" based on that information. Keen Independent did not ask companies providing goods whether they were interested in working as subcontractors as this is less relevant than in construction or for professional services.

Figure 6-3.  
Number of businesses included in  
the availability database

Note:

Percentages may not add to 100.00 percent  
due to rounding.

Source:

Keen Independent 2017 availability survey.

| Race/ethnicity and gender  | Number<br>of firms | Percent<br>of firms |
|----------------------------|--------------------|---------------------|
| African American-owned     | 240                | 4.74 %              |
| Asian American-owned       | 101                | 1.99                |
| Hispanic American-owned    | 93                 | 1.84                |
| Native American-owned      | 36                 | 0.71                |
| <b>Total MBE</b>           | <b>470</b>         | <b>9.28 %</b>       |
| WBE (white women-owned)    | 925                | 18.27               |
| <b>Total MBE/WBE</b>       | <b>1,395</b>       | <b>27.55 %</b>      |
| Total majority-owned firms | 3,669              | 72.45               |
| <b>Total firms</b>         | <b>5,064</b>       | <b>100.00 %</b>     |

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

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

- Dollar-weighted availability estimates represent the percentage of Admin procurement dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of Admin construction, 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 Admin procurement 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 76,010 Admin 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 60+ types of construction, professional services, goods or other services that accounted for most of participating entity procurement dollars);
  - Are qualified and interested in performing work for the public sector in that particular role (prime contractor/subcontractor if a construction or professional services contract) or had performed that role for public agencies in Minnesota in the past six years (based on survey response or analysis of combined entity contract and subcontract data);
  - Are able to do work in that geographic location;
  - Had bid on or performed work of that size in Minnesota in the past six years (or had done so based on combined entity contract data for the study period); and
  - Were in business in the year that the contract or task order was awarded.
2. For the specific procurement, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in step 1 above.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 6-4).

The study team repeated those steps for each procurement examined in the disparity study for Admin. 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 MBE/WBEs and estimates of availability for each MBE/WBE group. Figure 6-4 provides an example of how the study team calculated availability for a specific subcontract in the study period.

**Figure 6-4.**  
Example of an availability calculation

One of the subcontracts examined was for electrical work (\$91,540) on a 2015 contract for Admin in Southeast Minnesota. 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 2015;
- b. Indicated that they performed electrical work;
- c. Reported working on subcontracts on public agency projects in Minnesota in the past six years or indicated qualifications and interest in such subcontracts;
- d. Reported bidding on work of similar or greater size in the past six years in Minnesota; and
- e. Reported ability to perform work in Southeast Minnesota.

There were 159 businesses in the availability database that met those criteria. Of those businesses, 43 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 27 percent (i.e.,  $43/159 = 27\%$ ).

The weight applied to this contract was  $\$91,540 \div \$3.1 \text{ billion} = 0.003\%$  (equal to its share of total procurement dollars). Keen Independent made this calculation for each prime contract and subcontract.

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 participating entities 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. Overall Availability Results

Keen Independent used the approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for Admin procurements awarded during the study period.

Figure 6-5 presents overall dollar-weighted availability estimates by MBE/WBE group for those procurements. As shown, MBE/WBE availability for Admin procurement is 22.32 percent. This result is lower than the 28 percent of available firms that are MBE/WBE in Figure 6-3. Dollar-weighted availability was less for minority-owned firms (7.76%) than white women-owned firms (14.56%). Availability was 3.28 percent for African American-owned businesses and 2.02 percent for Asian American-owned businesses. For Hispanic American- and Native American-owned firms, availability was 1.04 percent and 1.41 percent, respectively.

Figure 6-5.  
Dollar weighted MBE/WBE  
availability for Admin  
procurements, July 2011–  
June 2016

Source:  
Keen Independent analysis of Admin  
procurements and 2017 availability  
survey data.

|                         | Total          |
|-------------------------|----------------|
| African American-owned  | 3.28 %         |
| Asian American-owned    | 2.02           |
| Hispanic American-owned | 1.04           |
| Native American-owned   | 1.41           |
| Total MBE               | 7.76 %         |
| WBE (white women-owned) | 14.56          |
| <b>Total MBE/WBE</b>    | <b>22.32 %</b> |

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 typically results in lower MBE/WBE availability benchmarks than a headcount approach due in large part to:

- Keen Independent’s consideration of types and sizes 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).



## **G. Strengths of the Keen Independent Approach to Calculating Availability Benchmarks**

The types and sizes of procurements for which MBE/WBEs are available in Minnesota tend to be smaller than those of other businesses. Therefore, MBE/WBEs are less likely to be identified as available for the largest procurements.

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.** Each participating entity has a different mix of the types of construction, professional services, goods and other services that they purchase. Some types of work, such as helicopter services, account for much of one entity's procurement dollars and a minimal amount of other entities' contract dollars.

Further support for this approach comes from the U.S. Department of Transportation (USDOT) regarding calculation of Disadvantaged Business Enterprise (DBE) availability. USDOT suggests calculating availability based on businesses' abilities to perform specific types of work. USDOT gives the following example in Part II F of "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program":

*For instance, if 90 percent of your contract dollars will be spent on heavy construction and 10 percent on trucking, you should weight your calculation of the relative availability of firms by the same percentages.<sup>4</sup>*

The study team took type of work into account by examining more than 60 different subindustries related to construction, professional services, goods and other services procurements as part of estimating availability for participating entity 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 participating entity 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. If it was a construction or professional services contract:

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

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<sup>4</sup> Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program. (2013, June 25). Available at <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>.

**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 counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one procurement of an equivalent or greater dollar value in Minnesota in the previous six years, based on the most inclusive information from survey results and analysis of past participating entity procurements (including subcontracts).

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

**Accounting for the geographic location of the work.** The study team determined the location where work was performed for participating entity procurements contracts according to six regions: Twin Cities Metro Area and Northeast, Northwest, Central, Southeast and Southwest Minnesota.

**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. This approach is consistent with USDOT’s “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program,” which suggests a dollar-weighted approach to calculating availability.

## CHAPTER 7.

### Utilization and Disparity Analysis

Keen Independent's utilization analysis examines the percentage of Admin procurement dollars going to minority- and women-owned firms. The disparity analysis compares utilization of minority- and women-owned firms with the participation that might be expected in Admin procurement based on the availability analysis. (Chapter 6 and Appendix D explain the availability analysis.)

Chapter 7 presents results of the utilization and disparity analysis in four parts:

- A. Overview of the utilization analysis;
- B. Utilization of MBE/WBEs in Admin Procurement;
- C. Disparity analysis for Admin procurement; and
- D. Statistical significance of disparity analysis results.

#### A. Overview of the Utilization Analysis

Keen Independent analyzed the participation of minority- and women-owned firms in Admin procurement from July 2011 through June 2016. In total, Keen Independent's utilization analysis included 76,010 procurements totaling \$3.1 billion over this time period.<sup>1</sup> This includes direct purchases, consultant agreements, prime contracts and subcontracts involved in Admin contracts.<sup>2</sup>

Chapter 4 and Appendix C explain how the study team compiled procurement records, and the exclusions made. Keen Independent also collected information about the race, ethnicity and gender of the business owner for firms receiving Admin procurements, including but going beyond vendor data maintained by Admin and TGB certification records (see Appendix C).

**Calculation of "utilization."** MBE/WBE "utilization" is measured as the percentage of procurement dollars awarded to MBE/WBEs during the study period (see Figure 7-1). Keen Independent calculated MBE/WBE utilization by dividing the dollars going to MBE/WBEs by the procurement dollars for all firms.

**Figure 7-1.**  
Defining and measuring "utilization"

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

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

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<sup>1</sup> The study team attempted to compile Admin data so that each procurement in the data corresponded to a unique purchasing decision, but this was not always possible, as described in Appendix C.

<sup>2</sup> Admin awards work through a variety of agreements. To simplify the discussion in Chapter 7, the utilization analysis refers to all such work as "procurements." Any use of the term "contracts" is made simply for readability, and also means "procurements." "Subcontracts" include first-tier and lower-tier subcontracts.

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 was 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.

## **B. Utilization of MBE/WBEs in Admin Procurement**

Figure 7-2 on the following page presents information for minority- and women-owned firms (top portion of the table) and certified firms (bottom portion of the table) receiving Admin procurements, including subcontracts, during the study period. Figure 7-2 shows:

- Total number of procurements awarded to the group (e.g., 8,446 prime contracts, subcontracts and other procurements to white women-owned firms);
- Combined dollars of procurements going to the group (e.g., \$274,615,000 to white women-owned firms); and
- The percentage of combined contract dollars for the group (e.g., white women-owned firms received 8.82 percent of the Admin procurement dollars examined in the study).

As shown in the top portion of Figure 7-2, white women-owned firms (WBEs) received the largest number of procurements, the most dollars and the highest share of dollars out of all MBE/WBE groups. Among minority-owned firms, Asian American-owned firms received the most procurements (948) and procurement dollars (\$51 million). About 1.7 percent of Admin procurement dollars went to Asian American-owned firms. African American-owned firms obtained \$25 million of Admin procurement dollars (0.81% of total). Hispanic American-owned firms and Native American-owned firms each received about \$3 million in procurement dollars (0.09% of total).

There were 21 procurements going to MBEs for which race and ethnicity could not be determined (less than 0.01 percent of total dollars). Because of the small size of the unknown MBE dollars, it is included in the disparity analysis for MBEs but not the individual groups.

The bottom portion of Figure 7-2 presents the number of procurements and procurement dollars going to the subset of the minority- and women-owned firms that were TG/ED/VO-certified at the time of the procurement award. In total, certified firms received 4,853 procurements and \$258 million of the procurement dollars during the study period. Certified firms accounted for 8.27 percent of Admin procurement dollars. Most of the dollars going to certified firms went to white women-owned businesses and majority-owned companies.

Figure 7-2.

Utilization of minority- and women-owned firms in Admin procurements, July 2011–June 2016

|                                 | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b>       |                            |                     |                       |
| African American-owned          | 584                        | \$ 25,169           | 0.81 %                |
| Asian American-owned            | 948                        | 51,495              | 1.65                  |
| Hispanic American-owned         | 121                        | 2,931               | 0.09                  |
| Native American-owned           | 148                        | 2,733               | 0.09                  |
| Unknown MBE                     | 21                         | 216                 | 0.01                  |
| Total MBE                       | 1,822                      | \$ 82,544           | 2.65 %                |
| WBE (white women-owned)         | 8,446                      | 274,615             | 8.82                  |
| <b>Total MBE/WBE</b>            | <b>10,268</b>              | <b>\$ 357,159</b>   | <b>11.47 %</b>        |
| Majority-owned                  | 65,742                     | 2,757,893           | 88.53                 |
| <b>Total</b>                    | <b>76,010</b>              | <b>\$ 3,115,052</b> | <b>100.00 %</b>       |
| <b>TG/ED/VO-certified</b>       |                            |                     |                       |
| African American-owned          | 121                        | \$ 12,410           | 0.40 %                |
| Asian American-owned            | 534                        | 24,948              | 0.80                  |
| Hispanic American-owned         | 61                         | 2,180               | 0.07                  |
| Native American-owned           | 40                         | 1,522               | 0.05                  |
| Total MBE                       | 756                        | \$ 41,060           | 1.32 %                |
| WBE (white women-owned)         | 2,877                      | 128,715             | 4.13                  |
| Majority-owned                  | 1,220                      | 87,980              | 2.82                  |
| <b>Total TG/ED/VO-certified</b> | <b>4,853</b>               | <b>\$ 257,755</b>   | <b>8.27 %</b>         |
| Non-TG/ED/VO-certified          | 71,157                     | 2,857,297           | 91.73                 |
| <b>Total</b>                    | <b>76,010</b>              | <b>\$ 3,115,052</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

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

Source: Keen Independent from data on Admin procurements July 2011-June 2016.

## C. Disparity Analysis for Admin Procurement

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on Admin procurements with the percentage of procurement dollars that MBE/WBEs might be expected to receive based on their availability for that work. (Availability is also referred to as the “utilization benchmark.”) Keen Independent made those comparisons for individual MBE/WBE groups. Chapter 6 explains how the study team developed benchmarks from the availability data.

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

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

Figure 7-3 describes how Keen Independent calculated disparity indices.

Figure 7-3.  
Calculation of disparity indices

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

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

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

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

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<sup>3</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10<sup>th</sup> Cir. 1994). Also see Appendix B for additional discussion.

**Results for minority- and women-owned firms on Admin procurements.** The utilization of minority- and women-owned firms in Admin procurement during the study period — 11.47 percent of total procurement dollars — was below the 22.32 percent that might be expected from the availability analysis. Figure 7-4 presents these overall results from the disparity analysis.

The resulting disparity index for MBE/WBEs is 51 (11.47% divided by 22.32%, multiplied by 100). Because the index was below 80, the disparity is “substantial,” as explained on the previous page. The disparity occurred even though Admin operated the TG Program during this time period.

**Figure 7-4.**  
MBE/WBE utilization and availability for  
Admin procurements,  
July 2011–June 2016

Note:

76,010 procurements analyzed.

Source:

Keen Independent utilization and availability analyses for Admin procurements.

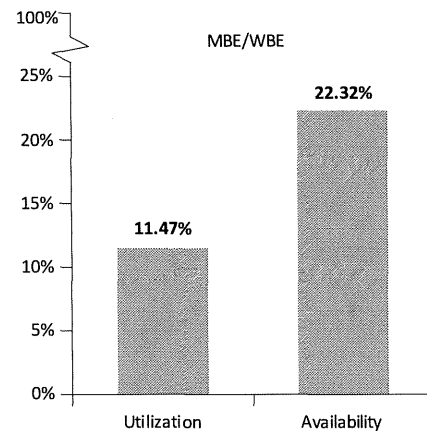


Figure 7-5 shows utilization, availability and disparity results for individual MBE groups as well as white women-owned firms.<sup>4</sup>

**Figure 7-5.**  
Disparity analysis for Admin procurements, July 2011–June 2016

|                         | Utilization    | Availability   | Disparity index |
|-------------------------|----------------|----------------|-----------------|
| African American-owned  | 0.81 %         | 3.28 %         | 25              |
| Asian American-owned    | 1.65           | 2.02           | 82              |
| Hispanic American-owned | 0.09           | 1.04           | 9               |
| Native American-owned   | 0.09           | 1.41           | 6               |
| Unknown MBE             | 0.01           |                |                 |
| <b>Total MBE</b>        | <b>2.65 %</b>  | <b>7.76 %</b>  | <b>34</b>       |
| WBE (white women-owned) | 8.82           | 14.56          | 61              |
| <b>Total MBE/WBE</b>    | <b>11.47 %</b> | <b>22.32 %</b> | <b>51</b>       |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Admin procurements.

<sup>4</sup> Note that the utilization and availability statistics are rounded to the nearest tenth of a percent, but the disparity indices were calculated from non-rounded results.

**African American-owned firms.** African American-owned firms received 0.81 percent of contract dollars, substantially less than what might be expected in the availability analysis (3.28%). The disparity index for this group was 25.

**Asian-Pacific American-owned businesses.** Utilization of Asian American-owned firms (1.65%) was below what might be expected from the availability analysis (2.02%), and the disparity index was 82 for this group.

**Hispanic American-owned firms.** From July 2011 through June 2016, Hispanic American-owned firms obtained 0.09 percent of Admin procurement dollars, substantially below what might be expected from the availability analysis (1.04%), resulting in a disparity index of 9.

**Native American-owned businesses.** Native American-owned firms had a utilization of 0.09 percent, substantially below what might be expected based on the availability analysis (1.41%). The disparity index for this group was 6.

**White women-owned firms.** White women-owned firms received 8.82 percent of Admin procurement dollars, which was substantially less than what might be expected from the availability analysis (14.56%). The disparity index for this group was 61.

**Utilization and disparity results by industry and for other sets of Admin procurements.**

Chapter 8 examines utilization results for subsets of Admin procurements to further explore factors behind the disparities identified in Chapter 7. For example, Chapter 8 presents utilization and availability results for Admin's construction, professional services, goods and other services procurements.

**D. 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 opportunity 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 Chapter 6).

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 20,527 businesses on the list of potentially available companies, a very large number of responses. The “response rate” to the survey was very high: 34 percent of the businesses on the initial list were successfully contacted. Figure 7-6 explains the high level of statistical confidence in the availability results due to the number of responses and the high response rate.

Figure 7-6.

**Confidence interval for availability results**

Keen Independent telephone survey effort successfully reached 20,527 business establishments — a very large number of firms for this type of research. Of those businesses, 5,064 were available for participating entity procurements. If the results are treated as a sample, the reported 27.6 percent representation of MBE/WBEs among all available firms is accurate within about +/- 0.5 percentage points. By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and a finite population correction factor when determining this confidence interval.)

- 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 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 Minnesota-sponsored study. Efforts to address potential language barriers also minimized the possibility of under-reaching certain groups.

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 Admin procurements for the study period above \$2,000 (and subcontracts of any size). The study team successfully examined each procurement in the study period included in the Admin data and was able to code firms receiving those contracts and subcontracts as minority-owned (by group), white women-owned or majority-owned. There was no sampling of the contract data.

The study team performed in-depth research on ownership status of all firms obtaining at least \$100,000 of Admin procurements during the study period. Keen Independent also coded ownership of firms below this threshold, but did not perform in-depth research on every firm. Participating entities and the External Stakeholder Group also reviewed firm ownership information. Although inaccuracies in ownership information are possible, it is extremely unlikely that they could materially affect utilization results.

In sum, it is appropriate to use the utilization results as highly accurate information reflecting a population of Admin procurements.

Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”

**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 10 Admin 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 7-7 describes Keen Independent’s use of Monte Carlo analysis to statistically examine this issue.

**Results.** Figure 7-8 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 disparities for MBEs in any of the 10,000 simulation runs. Therefore, one can be confident that chance in contract and subcontract awards can be rejected as an explanation for the observed disparity for minority-owned businesses in Admin contracts.

Figure 7-7.  
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 Admin procurements. The output of a single simulation represented simulated percentage of Admin procurement dollars going to MBEs.

The entire Monte Carlo simulation for Admin 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 and utilization of WBEs if procurements were awarded randomly based on the availability of businesses working in relevant Minnesota industries.

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

The Monte Carlo simulations also did not replicate the disparity for white women-owned firms in any of the 10,000 simulation runs. Applying a 95 percent confidence level for “statistical significance,” the disparity for white women-owned firms is statistically significant, and one can reject chance in contract awards as the explanation of the disparity.

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.<sup>5</sup>

Figure 7-8.  
Monte Carlo results for MBEs and WBEs for Admin procurements,  
July 2011–June 2016

|  | MBE     | WBE     |
|--|---------|---------|
| Disparity index  | 34      | 61      |
| Number of simulation runs out of 10,000 that replicated observed utilization | 0       | 0       |
| Probability of observed disparity occurring due to "chance"                  | < 0.1 % | < 0.1 % |
| Reject chance in awards of contracts as a cause of disparity?                | Yes     | Yes     |

Source: Keen Independent from Monte Carlo model for Admin procurements.

<sup>5</sup> 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.

## CHAPTER 8.

### Further Exploration of MBE/WBE Utilization

Building upon the analysis presented in Chapter 7, Keen Independent further examines the utilization of minority- and women-owned firms for different types, locations and sizes of Admin procurements in Chapter 8. Chapter 8 also reports participation of TG/ED/VO-certified firms.

Chapter 8 analysis of MBE/WBE utilization includes:

- A. Trends during the study period;
- B. Within Twin Cities Metropolitan Area and outside the Metropolitan Area;
- C. Results by industry;
- D. Prime contracts compared with subcontracts; and
- E. Results by size of procurement.

#### A. Trends during the Study Period

Keen Independent divided the five-year study period in half to examine whether MBE/WBE participation increased between the early years and the later years of the study period. As shown in Figure 8-1, MBE/WBE utilization was higher in the more recent time period (13.3%) than the first three years (10.1%)

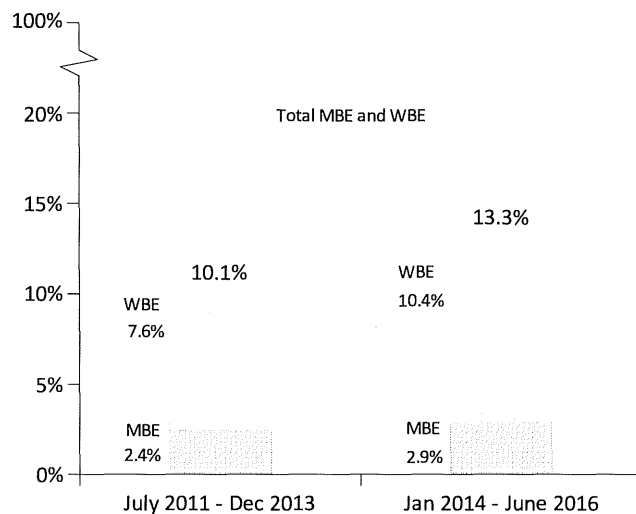
Figure 8-1.  
MBE/WBE participation for Admin procurements for July 2011–Dec 2013 and Jan 2014–June 2016

**Note:**

Number of procurements analyzed is 38,139 for July 2011–Dec 2012 and 37,871 for Jan 2013–June 2016.

**Source:**

Keen Independent from Admin procurements, July 2011–June 2016.



Keen Independent examined trends utilization for all MBE/WBEs, by group, and certified firms. Figure 8-2 provides these results. As shown in Figure 8-2, the increase in overall MBE/WBE utilization was solely due to an increase in participation by Asian American-owned firms and white women-owned firms.

There was little change in participation of TG/ED/VO-certified businesses between the two time periods (overall utilization of about 8 percent). Utilization of white male-owned firms that were certified was 3.02 percent in July 2011 through December 2013 and 2.56 percent for January 2014 through June 2016.

Figure 8-2.

Utilization of minority- and women-owned firms in Admin procurement, July 2011–Dec 2013 and Jan 2014–June 2016

|                                 | July 2011–Dec 2013  |                    | Jan 2014–June 2016  |                    |
|---------------------------------|---------------------|--------------------|---------------------|--------------------|
|                                 | \$1,000s            | Percent of dollars | \$1,000s            | Percent of dollars |
| <b>Business ownership</b>       |                     |                    |                     |                    |
| African American-owned          | \$ 19,574           | 1.09 %             | \$ 5,595            | 0.42 %             |
| Asian American-owned            | 20,973              | 1.17               | 30,522              | 2.31               |
| Hispanic American-owned         | 1,444               | 0.08               | 1,486               | 0.11               |
| Native American-owned           | 2,020               | 0.11               | 713                 | 0.05               |
| Unknown MBE                     | 107                 | 0.01               | 109                 | 0.01               |
| Total MBE                       | \$ 44,118           | 2.46 %             | \$ 38,425           | 2.91 %             |
| WBE (white women-owned)         | 137,881             | 7.68               | 136,735             | 10.35              |
| <b>Total MBE/WBE</b>            | <b>\$ 181,999</b>   | <b>10.14 %</b>     | <b>\$ 175,160</b>   | <b>13.26 %</b>     |
| Majority-owned                  | 1,612,488           | 89.86              | 1,145,405           | 86.74              |
| <b>Total</b>                    | <b>\$ 1,794,487</b> | <b>100.00 %</b>    | <b>\$ 1,320,565</b> | <b>100.00 %</b>    |
| <b>TG/ED/VO-certified</b>       |                     |                    |                     |                    |
| African American-owned          | \$ 12,211           | 0.68 %             | \$ 200              | 0.02 %             |
| Asian American-owned            | 10,973              | 0.61               | 13,975              | 1.06               |
| Hispanic American-owned         | 864                 | 0.05               | 1,316               | 0.10               |
| Native American-owned           | 1,455               | 0.08               | 67                  | 0.01               |
| Total MBE                       | \$ 25,503           | 1.42 %             | \$ 15,558           | 1.18 %             |
| WBE (white women-owned)         | 70,633              | 3.94               | 58,082              | 4.40               |
| Majority-owned                  | 54,114              | 3.02               | 33,866              | 2.56               |
| <b>Total TG/ED/VO-certified</b> | <b>\$ 150,250</b>   | <b>8.37 %</b>      | <b>\$ 107,505</b>   | <b>8.14 %</b>      |
| Non-TG/ED/VO-certified          | 1,644,237           | 91.63              | 1,213,060           | 91.86              |
| <b>Total</b>                    | <b>\$ 1,794,487</b> | <b>100.00 %</b>    | <b>\$ 1,320,565</b> | <b>100.00 %</b>    |

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

Source: Keen Independent from data on Admin procurements July 2011–June 2016.

## B. Within Twin Cities MSA and outside the MSA

Figure 8-3 presents MBE/WBE participation for Admin procurements located within the Twin Cities Metropolitan Area and outside the Twin Cities area. MBE/WBE participation was higher for procurements within the Twin Cities region (12.3%) than for the balance of Minnesota (8.7%).

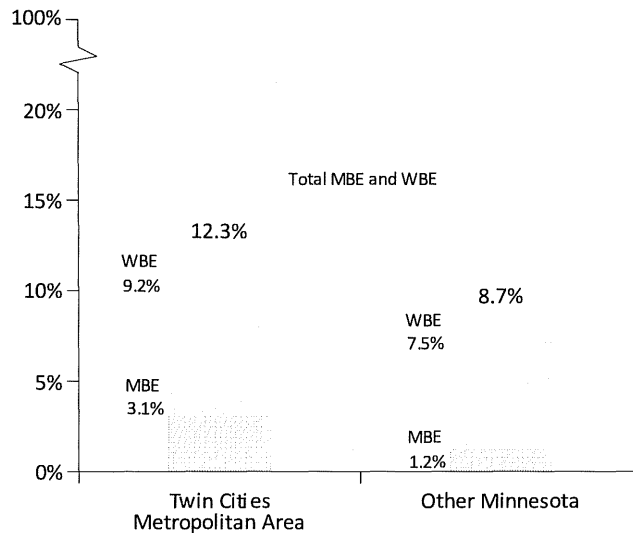
**Figure 8-3.**  
MBE/WBE share of dollars for Admin procurements inside and outside the Twin Cities Metropolitan Area, July 2011–June 2016

Note:

Number of procurements analyzed is 50,441 for inside the MSA and 25,790 for outside the MSA.

Source:

Keen Independent from Admin procurements, July 2011–June 2016.



Keen Independent also researched the percentage of procurement dollars going to TG/ED/VO-certified firms (not shown in Figure 8-3).

- For procurements within the Twin Cities Metropolitan Area, 5.69 percent of procurement dollars went to MBE/WBEs that were TG/ED/VO-certified. Also, 0.70 percent of dollars went to white male-owned firms that were certified (including businesses owned by persons with disabilities or that were ED- or VO-certified).
- Outside the Metropolitan Area, MBE/WBEs that were TG/ED/VO-certified obtained 4.66 percent of procurement dollar, somewhat less than in the Twin Cities region. Majority-owned firms that were certified received 9.12 percent of Admin procurement dollars for procurements outside the Twin Cities region.

## C. Results by Industry

Figures 8-4 through 8-7 on the following pages present information for construction, professional services, goods and other services procurements. In each table, participation of minority- and women-owned firms is shown in the top portion and results based on certification status are provided in the bottom portion. (These figures follow the same format as Figure 7-2 in Chapter 7, which examined all procurements.)

As shown in Figure 8-4 through 8-7, MBE/WBEs received the largest share of procurement dollars for professional services procurements (13.13%) and the lowest share for construction contracts (7.56%). This discussion of utilization for each industry is followed by disparity analyses for each industry (see Figure 8-8).

**Construction.** Figure 8-4 examines utilization of minority- and women-owned firms in Admin construction contracts (including subcontractors). Data come from Keen Independent's analysis of IC134 forms for Admin construction projects. (Note that some construction projects are classified under "professional services" because the prime contractor was a construction management firm.)

As shown in the top portion of Figure 8-4, 7.56 percent of construction contract dollars went to MBE/WBEs, with white women-owned firms accounting for nearly all of that participation. Less than 1 percent of construction contract dollars went to MBEs.

The bottom portion of Figure 8-4 provides results for TG/ED/VO-certified firms. MBE/WBEs that were certified obtained 4.62 percent of construction contract dollars and white male-owned businesses that were TG/ED/VO-certified received 9.63 percent of contract dollars.

Figure 8-4.

Utilization of minority- and women-owned firms in Admin construction contracts, July 2011–June 2016

|                                 | Number of<br>procurements* | \$1,000s          | Percent of<br>dollars |
|---------------------------------|----------------------------|-------------------|-----------------------|
| <b>Business ownership</b>       |                            |                   |                       |
| African American-owned          | 4                          | \$ 19             | 0.00 %                |
| Asian American-owned            | 20                         | 1,765             | 0.35                  |
| Hispanic American-owned         | 31                         | 955               | 0.19                  |
| Native American-owned           | 14                         | 1,067             | 0.21                  |
| Unknown MBE                     | 1                          | 1                 | 0.00                  |
| <b>Total MBE</b>                | <b>70</b>                  | <b>\$ 3,807</b>   | <b>0.75 %</b>         |
| WBE (white women-owned)         | 555                        | 34,402            | 6.80                  |
| <b>Total MBE/WBE</b>            | <b>625</b>                 | <b>\$ 38,209</b>  | <b>7.56 %</b>         |
| Majority-owned                  | 4,119                      | 467,471           | 92.44                 |
| <b>Total</b>                    | <b>4,744</b>               | <b>\$ 505,680</b> | <b>100.00 %</b>       |
| <b>TG/ED/VO-certified</b>       |                            |                   |                       |
| African American-owned          | 3                          | \$ 17             | 0.00 %                |
| Asian American-owned            | 18                         | 1,352             | 0.27                  |
| Hispanic American-owned         | 30                         | 955               | 0.19                  |
| Native American-owned           | 13                         | 1,065             | 0.21                  |
| <b>Total MBE</b>                | <b>64</b>                  | <b>\$ 3,389</b>   | <b>0.67 %</b>         |
| WBE (white women-owned)         | 270                        | 19,974            | 3.95                  |
| White male-owned                | 215                        | 48,698            | 9.63                  |
| <b>Total TG/ED/VO-certified</b> | <b>549</b>                 | <b>\$ 72,061</b>  | <b>14.25 %</b>        |
| Non-TG/ED/VO-certified          | 4,195                      | 433,620           | 85.75                 |
| <b>Total</b>                    | <b>4,744</b>               | <b>\$ 505,680</b> | <b>100.00 %</b>       |

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

Source: Keen Independent from data on Admin procurements July 2011–June 2016.

**Professional services.** Figure 8-5 examines utilization of minority- and women-owned firms for Admin professional services contracts (which includes construction when the prime was a construction management company). MBEs received 3.72 percent of professional services procurement dollars and WBEs received 9.41 percent of those dollars. Most of the participation of MBEs was from Asian American-owned companies.

Of the combined MBE/WBE utilization of 13.13 percent, MBE/WBEs certified as TG/ED/VO businesses accounted for 6.9 percentage points.

Figure 8-5.

Utilization of minority- and women-owned firms in Admin professional services contracts, July 2011–June 2016

|                                 | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b>       |                            |                     |                       |
| African American-owned          | 437                        | \$ 12,711           | 0.80 %                |
| Asian American-owned            | 545                        | 43,863              | 2.75                  |
| Hispanic American-owned         | 49                         | 1,749               | 0.11                  |
| Native American-owned           | 19                         | 889                 | 0.06                  |
| Unknown MBE                     | 4                          | 134                 | 0.01                  |
| Total MBE                       | 1,054                      | \$ 59,346           | 3.72 %                |
| WBE (white women-owned)         | 2,018                      | 150,046             | 9.41                  |
| <b>Total MBE/WBE</b>            | <b>3,072</b>               | <b>\$ 209,392</b>   | <b>13.13 %</b>        |
| Majority-owned                  | 16,671                     | 1,385,345           | 86.87                 |
| <b>Total</b>                    | <b>19,743</b>              | <b>\$ 1,594,738</b> | <b>100.00 %</b>       |
| <b>TG/ED/VO-certified</b>       |                            |                     |                       |
| African American-owned          | 37                         | \$ 1,812            | 0.11 %                |
| Asian American-owned            | 277                        | 19,394              | 1.22                  |
| Hispanic American-owned         | 12                         | 1,089               | 0.07                  |
| Native American-owned           | 2                          | 296                 | 0.02                  |
| Total MBE                       | 328                        | \$ 22,591           | 1.42 %                |
| WBE (white women-owned)         | 1,092                      | 87,360              | 5.48                  |
| White male-owned                | 135                        | 27,766              | 1.74                  |
| <b>Total TG/ED/VO-certified</b> | <b>1,555</b>               | <b>\$ 137,717</b>   | <b>8.64 %</b>         |
| Non-TG/ED/VO-certified          | 18,188                     | 1,457,021           | 91.36                 |
| <b>Total</b>                    | <b>19,743</b>              | <b>\$ 1,594,738</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on Admin procurements July 2011–June 2016.



**Goods.** MBE/WBE participation was 11.82 percent for Admin goods purchases (see Figure 8-6). MBEs received 1.09 percent and WBEs received 10.73 percent of goods procurement dollars.

TG/ED/VO-certified firms received 4.09 percent of Admin goods dollars, of which 2.86 percentage points was utilization of MBE/WBEs that were certified.

Figure 8-6.

Utilization of minority- and women-owned firms in Admin goods contracts,  
July 2011–June 2016

|                                 | Number of<br>procurements* | \$1,000s          | Percent of<br>dollars |
|---------------------------------|----------------------------|-------------------|-----------------------|
| <b>Business ownership</b>       |                            |                   |                       |
| African American-owned          | 60                         | \$ 3,568          | 0.51 %                |
| Asian American-owned            | 206                        | 3,734             | 0.53                  |
| Hispanic American-owned         | 21                         | 142               | 0.02                  |
| Native American-owned           | 25                         | 162               | 0.02                  |
| Unknown MBE                     | 5                          | 49                | 0.01                  |
| Total MBE                       | 317                        | \$ 7,655          | 1.09 %                |
| WBE (white women-owned)         | 4,558                      | 75,047            | 10.73                 |
| <b>Total MBE/WBE</b>            | <b>4,875</b>               | <b>\$ 82,702</b>  | <b>11.82 %</b>        |
| Majority-owned                  | 32,277                     | 616,703           | 88.18                 |
| <b>Total</b>                    | <b>37,152</b>              | <b>\$ 699,405</b> | <b>100.00 %</b>       |
| <b>TG/ED/VO-certified</b>       |                            |                   |                       |
| African American-owned          | 54                         | \$ 3,533          | 0.51 %                |
| Asian American-owned            | 121                        | 2,710             | 0.39                  |
| Hispanic American-owned         | 16                         | 123               | 0.02                  |
| Native American-owned           | 4                          | 44                | 0.01                  |
| Total MBE                       | 195                        | \$ 6,410          | 0.92 %                |
| WBE (white women-owned)         | 875                        | 13,579            | 1.94                  |
| White male-owned                | 769                        | 8,636             | 1.23                  |
| <b>Total TG/ED/VO-certified</b> | <b>1,839</b>               | <b>\$ 28,625</b>  | <b>4.09 %</b>         |
| Non-TG/ED/VO-certified          | 35,313                     | 670,780           | 95.91                 |
| <b>Total</b>                    | <b>37,152</b>              | <b>\$ 699,405</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on Admin procurements July 2011-June 2016.

**Other services.** Figure 8-7 outlines participation of minority- and women-owned firms in Admin other services contracts (services other than professional services). MBE/WBE utilization was 8.52 percent for other services procurements. Participation was highest for white women-owned firms (4.80%) and African American-owned firms (2.81%).

TG/ED/VO-certified firms, in total, received 6.14 percent of Admin other services procurement dollars. Certified firms accounted for most of the participation of African American-owned businesses (2.24 percentage points of the total).

Figure 8-7.

Utilization of minority- and women-owned firms in Admin other services contracts,  
July 2011–June 2016

|                                 | Number of<br>procurements* | \$1,000s          | Percent of<br>dollars |
|---------------------------------|----------------------------|-------------------|-----------------------|
| <b>Business ownership</b>       |                            |                   |                       |
| African American-owned          | 83                         | \$ 8,872          | 2.81 %                |
| Asian American-owned            | 177                        | 2,134             | 0.68                  |
| Hispanic American-owned         | 20                         | 84                | 0.03                  |
| Native American-owned           | 90                         | 615               | 0.20                  |
| Unknown MBE                     | 11                         | 31                | 0.01                  |
| Total MBE                       | 381                        | \$ 11,736         | 3.72 %                |
| WBE (white women-owned)         | 1,315                      | 15,120            | 4.80                  |
| <b>Total MBE/WBE</b>            | <b>1,696</b>               | <b>\$ 26,856</b>  | <b>8.52 %</b>         |
| Majority-owned                  | 12,675                     | 288,374           | 91.48                 |
| <b>Total</b>                    | <b>14,371</b>              | <b>\$ 315,229</b> | <b>100.00 %</b>       |
| <b>TG/ED/VO-certified</b>       |                            |                   |                       |
| African American-owned          | 27                         | \$ 7,049          | 2.24 %                |
| Asian American-owned            | 118                        | 1,491             | 0.47                  |
| Hispanic American-owned         | 3                          | 14                | 0.00                  |
| Native American-owned           | 21                         | 117               | 0.04                  |
| Total MBE                       | 169                        | \$ 8,671          | 2.75 %                |
| WBE (white women-owned)         | 640                        | 7,801             | 2.47                  |
| White male-owned                | 101                        | 2,880             | 0.91                  |
| <b>Total TG/ED/VO-certified</b> | <b>910</b>                 | <b>\$ 19,352</b>  | <b>6.14 %</b>         |
| Non-TG/ED/VO-certified          | 13,461                     | 295,877           | 93.86                 |
| <b>Total</b>                    | <b>14,371</b>              | <b>\$ 315,229</b> | <b>100.00 %</b>       |

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

Source: Keen Independent from data on Admin procurements July 2011–June 2016.

**Disparity analyses for each industry.** Keen Independent compared MBE/WBE utilization, by racial, ethnic and gender group, to the availability benchmarks developed for each group for each of the four industries. The study team followed the procedures described in Chapter 6 to determine availability benchmarks for each industry. Figure 8-8 on the following page provides results, which are summarized below.

**Construction.** MBE/WBE utilization of 7.56 percent in Admin construction contracts was less than the 20.05 percent that might be expected from the availability analysis for those contracts. The resulting disparity index was 38, indicating a substantial disparity. (Chapter 7 explains the calculation of a disparity index and that an index of 100 is “parity.”)

There were disparities between utilization and availability for each MBE group and for white women-owned firms in Admin construction contracts. Each disparity was substantial.

**Professional services.** Although MBE/WBE participation for Admin professional service contracts (13.13%) was higher than for construction, the availability benchmark was also higher (23.57%). The disparity analysis for Admin professional services procurements also indicates a substantial disparity (disparity index of 56).<sup>1</sup>

Results in Figure 8-8 indicate substantial disparities for each MBE/WBE group except for Asian American-owned firms. In addition to other components of the TG Program, Admin’s SITE program that encouraged participation of TG-certified IT firms may have been effective in increasing utilization of Asian American-owned companies.

**Goods.** About 11.82 percent of Admin goods procurement dollars went to MBE/WBEs, substantially below the 21.28 percent that might be anticipated from the availability analysis (disparity index of 56). There were disparities for each MBE group and for white women-owned firms. Each disparity was substantial.

**Other services.** For Admin’s other services procurements, the difference between MBE/WBE utilization (8.52%) and availability (21.98%) was also substantial. The disparity index for other services procurements was 39. There were substantial disparities for each MBE/WBE group.

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<sup>1</sup> Note that 0.01 percent of professional services dollars went to MBEs for which race and ethnicity could not be determined. This utilization is only included in the totals for MBEs and not in the other disparity calculations. (This occurs for goods and other services procurements as well.)

Figure 8-8.

Disparity analysis for Admin procurements, July 2011–June 2016

|                              | Utilization    | Availability   | Disparity index |
|------------------------------|----------------|----------------|-----------------|
| <b>Construction</b>          |                |                |                 |
| African American-owned       | 0.00 %         | 1.91 %         | 0               |
| Asian American-owned         | 0.35           | 0.97           | 36              |
| Hispanic American-owned      | 0.19           | 1.04           | 18              |
| Native American-owned        | 0.21           | 3.33           | 6               |
| Unknown MBE                  | 0.00           |                |                 |
| Total MBE                    | 0.75 %         | 7.26 %         | 10              |
| WBE (white women-owned)      | 6.80           | 12.79          | 53              |
| <b>Total MBE/WBE</b>         | <b>7.56 %</b>  | <b>20.05 %</b> | <b>38</b>       |
| <b>Professional services</b> |                |                |                 |
| African American-owned       | 0.80 %         | 3.83 %         | 21              |
| Asian American-owned         | 2.75           | 2.47           | 111             |
| Hispanic American-owned      | 0.11           | 0.66           | 17              |
| Native American-owned        | 0.06           | 1.50           | 4               |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 3.72 %         | 8.46 %         | 44              |
| WBE (white women-owned)      | 9.41           | 15.11          | 62              |
| <b>Total MBE/WBE</b>         | <b>13.13 %</b> | <b>23.57 %</b> | <b>56</b>       |
| <b>Goods</b>                 |                |                |                 |
| African American-owned       | 0.51 %         | 2.18 %         | 23              |
| Asian American-owned         | 0.53           | 1.82           | 29              |
| Hispanic American-owned      | 0.02           | 2.03           | 1               |
| Native American-owned        | 0.02           | 0.25           | 8               |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 1.09 %         | 6.29 %         | 17              |
| WBE (white women-owned)      | 10.73          | 14.99          | 72              |
| <b>Total MBE/WBE</b>         | <b>11.82 %</b> | <b>21.28 %</b> | <b>56</b>       |
| <b>Other services</b>        |                |                |                 |
| African American-owned       | 2.81 %         | 5.15 %         | 55              |
| Asian American-owned         | 0.68           | 1.88           | 36              |
| Hispanic American-owned      | 0.03           | 0.75           | 4               |
| Native American-owned        | 0.20           | 0.50           | 40              |
| Unknown MBE                  | 0.01           |                |                 |
| Total MBE                    | 3.72 %         | 8.27 %         | 45              |
| WBE (white women-owned)      | 4.80           | 13.71          | 35              |
| <b>Total MBE/WBE</b>         | <b>8.52 %</b>  | <b>21.98 %</b> | <b>39</b>       |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Admin procurements, including subcontracts.

## D. Construction Prime Contracts Compared with Subcontracts

Keen Independent further examined MBE/WBE participation as prime contractors and as subcontractors on Admin construction and construction management contracts (all prime contracts and subcontracts for which IC134 data were the source). The study team's analysis of prime contract dollars is based on dollars "retained" by the prime contractor (not subcontracted out).

Figure 8-9 shows that MBE/WBE participation was 9.4 percent for subcontracts, higher than found for prime contracts (6.6%).

- Of the subcontract dollars examined, 1.4 percent went to MBEs and 8.0 percent went to white women-owned firms.
- WBEs accounted for 6.0 percentage points of the 6.6 percent MBE/WBE utilization as prime contractors. Utilization of MBEs in prime contracts was 0.6 percent.

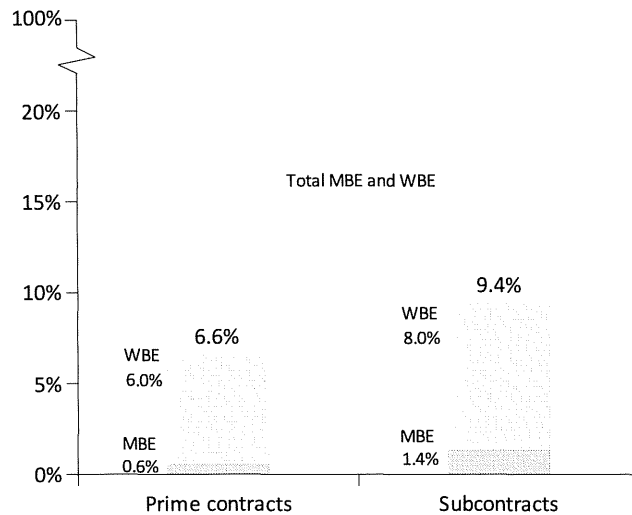
Figure 8-9.  
MBE/WBE share of dollars for prime  
contract and subcontract dollars for  
Admin construction contracts,  
July 2011–June 2016

Note:

Number of procurements analyzed is 4,897 for  
prime contracts and 1,306 for subcontracts.

Source:

Keen Independent from Admin procurements  
and IC134 data, July 2011–June 2016.



In addition to price preferences for TG/ED/VO-certified firms (6% up to a maximum of \$60,000), Admin operated a contract goals program for certified business for a portion of the study period (Keen Independent could not identify which contracts had goals in the contract data.)

Figure 8-10 on the following page provides detailed results for construction prime contracts and subcontracts, by group (top half of the table) and results for certified firms (bottom half of the table).

- More than one-half of the prime contract dollars going to WBEs was to certified firms. Similarly, most of the participation of MBEs as prime contractors was certified firms.
- The group of certified firms obtaining the largest share of prime contract dollars was majority-owned TG/ED/VO-certified companies (11.23%).

- Of the 1.37 percent participation of minority-owned firms in Admin subcontracts, all but 0.01 percentage points were to certified companies. WBEs that were certified obtained 2.77 percent of subcontract dollars. Majority-owned firms that were TG/ED/VO-certified received 2.31 percent of Admin subcontract dollars.

Figure 8-10.

Utilization of minority- and women-owned firms as prime contractors and subcontractors for Admin construction contracts, July 2011–June 2016

|                                 | Prime contracts |                   |                    | Subcontracts |                  |                    |
|---------------------------------|-----------------|-------------------|--------------------|--------------|------------------|--------------------|
|                                 | Number          | \$1,000s          | Percent of dollars | Number       | \$1,000s         | Percent of dollars |
| <b>Business ownership</b>       |                 |                   |                    |              |                  |                    |
| African American-owned          | 67              | \$ 94             | 0.02 %             | 4            | \$ 19            | 0.02 %             |
| Asian American-owned            | 15              | 1,684             | 0.32               | 9            | 261              | 0.30               |
| Hispanic American-owned         | 28              | 942               | 0.18               | 4            | 15               | 0.02               |
| Native American-owned           | 6               | 202               | 0.04               | 10           | 899              | 1.03               |
| Unknown MBE                     | 2               | 91                | 0.02               | 1            | 1                | 0.00               |
| Total MBE                       | 118             | \$ 3,013          | 0.57 %             | 28           | \$ 1,195         | 1.37 %             |
| WBE (white women-owned)         | 491             | 32,061            | 6.06               | 166          | 7,062            | 8.08               |
| <b>Total MBE/WBE</b>            | <b>609</b>      | <b>\$ 35,074</b>  | <b>6.63 %</b>      | <b>194</b>   | <b>\$ 8,257</b>  | <b>9.45 %</b>      |
| Majority-owned                  | 4,288           | 493,951           | 93.37              | 1,112        | 79,114           | 90.55              |
| <b>Total</b>                    | <b>4,897</b>    | <b>\$ 529,025</b> | <b>100.00 %</b>    | <b>1,306</b> | <b>\$ 87,371</b> | <b>100.00 %</b>    |
| <b>TG/ED/VO-certified</b>       |                 |                   |                    |              |                  |                    |
| African American-owned          | 1               | \$ 4              | 0.00 %             | 2            | \$ 13            | 0.01 %             |
| Asian American-owned            | 12              | 1,263             | 0.24               | 9            | 261              | 0.30               |
| Hispanic American-owned         | 27              | 940               | 0.18               | 3            | 14               | 0.02               |
| Native American-owned           | 5               | 200               | 0.04               | 9            | 897              | 1.03               |
| Total MBE                       | 45              | \$ 2,407          | 0.45 %             | 23           | \$ 1,185         | 1.36 %             |
| WBE (white women-owned)         | 230             | 20,539            | 3.88               | 72           | 2,416            | 2.77               |
| White male-owned                | 218             | 59,422            | 11.23              | 13           | 2,019            | 2.31               |
| <b>Total TG/ED/VO-certified</b> | <b>493</b>      | <b>\$ 82,368</b>  | <b>15.57 %</b>     | <b>108</b>   | <b>\$ 5,620</b>  | <b>6.43 %</b>      |
| Non-TG/ED/VO-certified          | 4,404           | 446,657           | 84.43              | 1,198        | 81,750           | 93.57              |
| <b>Total</b>                    | <b>4,897</b>    | <b>\$ 529,025</b> | <b>100.00 %</b>    | <b>1,306</b> | <b>\$ 87,371</b> | <b>100.00 %</b>    |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on Admin procurements July 2011–June 2016.

## E. Results by Size of Procurement

Keen Independent examined whether MBE/WBE participation as prime contractors and vendors varied by size of procurement. The study team reviewed the number and dollars of procurements for those less than \$50,000, between \$50,000 and \$100,000, and \$100,000 and above. (These data do not include subcontracts.)

- MBE/WBE participation as prime contractors and vendors was lower for purchases of \$100,000 or more (9.7%);
- For purchases under \$50,000, MBE/WBEs received 15.7 percent of the procurement dollars; and
- For purchases between \$50,000 and \$100,000, MBE/WBE utilization was 17.0 percent.

Figure 8-11 presents overall results.

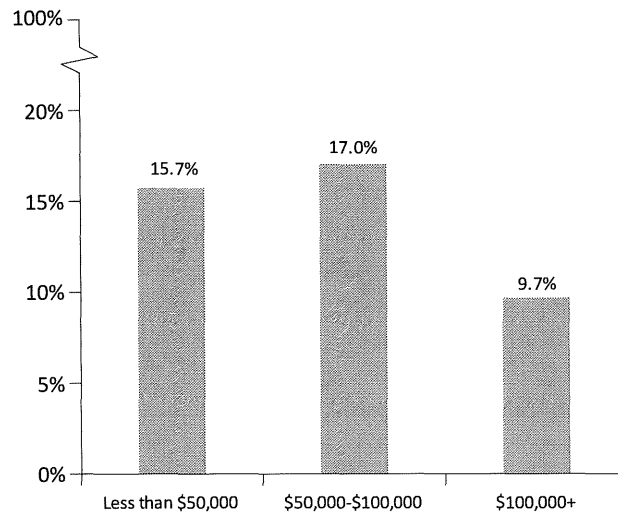
Figure 8-11.  
MBE/WBE participation for Admin  
procurements by size,  
July 2011–June 2016

**Note:**

Number of procurements analyzed is 67,184 for procurements under \$50,000, 3,366 for procurements between \$50,000 and \$100,000, and 4,154 for procurements of \$100,000 or more.

**Source:**

Keen Independent from Admin procurements, July 2011–June 2016.



## **CHAPTER 9.**

### **Combined Participating Entity Utilization and Disparity Analysis**

Keen Independent examined the percentage of procurement dollars going to minority- and women-owned firms for the participating entities:

- Minnesota Department of Administration (Admin);
- Minnesota State Colleges and Universities (Minnesota State);
- Minnesota Department of Transportation (MnDOT);
- Metropolitan Airports Commission (MAC);
- Metropolitan Mosquito Control District (MMCD);
- Metropolitan Council (Met Council);
- City of Minneapolis;
- City of Saint Paul; and
- Hennepin County.

The first five of these entities provide preferences to TGB firms and some also set TGB contract goals. Met Council, the City of Minneapolis and the City of Saint Paul have other race- and gender-based programs as well as neutral programs, and Hennepin County operates a small business enterprise (SBE) program for which CERT-certified companies are eligible.

The utilization and disparity analysis are presented in three parts:

- A. Utilization of MBE/WBEs in participating entity procurement;
- B. Disparity analysis for individual participating entities; and
- C. Disparity analysis for entities' combined procurement.

#### **A. Utilization of MBE/WBEs in Participating Entity Procurement**

Part A of Chapter 9 examines MBE/WBE participation by entity and the total procurement dollars going to minority-, women- and majority-owned firms for the combined entities.

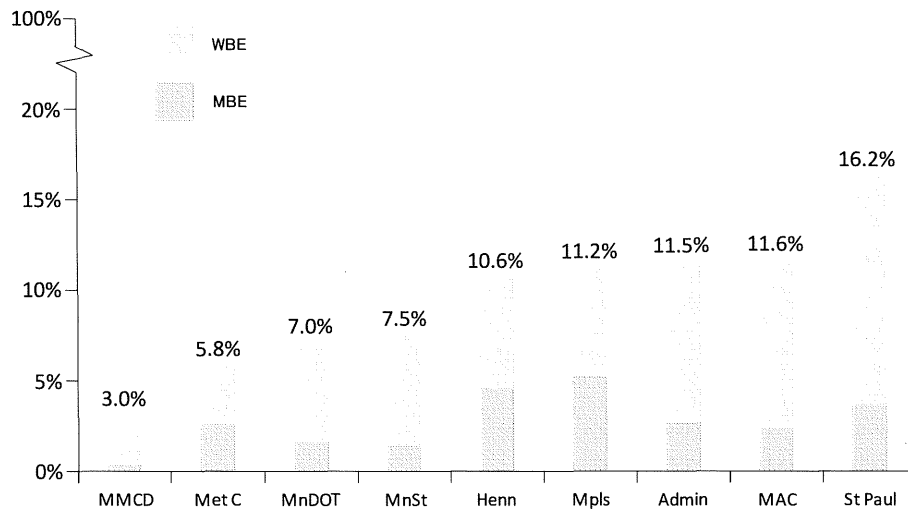
**Utilization results by entity.** Figure 9-1 examines the percentage of procurement dollars received by MBE/WBEs for each participating entity for the study period. MBE/WBE participation was lowest for entities for which programs were newer or not fully implemented during the study period



(MMCD, Met Council, MnDOT and Minnesota State). The City of Saint Paul had the highest overall utilization (16%).<sup>1</sup>

Figure 9-1.

MBE/WBE participation for participating entity procurements for July 2011–June 2016



Note: Number of contracts/subcontracts analyzed is 125,474.

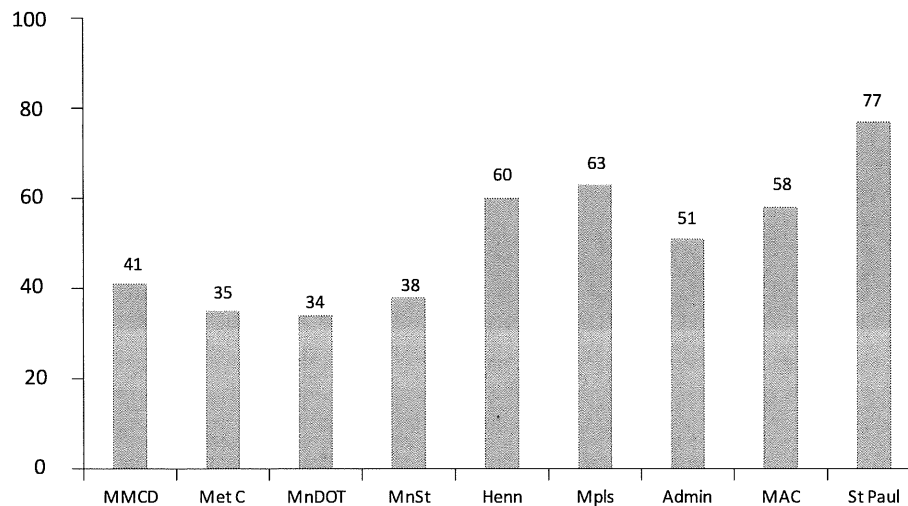
Source: Keen Independent from participating entity procurements, July 2011–June 2016.

**Disparity index results by entity.** Figure 9-2 examines the disparity index for each participating entity for the study period (“100” is parity). Although MMCD had the lowest MBE/WBE utilization, the availability benchmark was also relatively low for the District, and its disparity index was 41. MnDOT, Met Council and Minnesota State had lower disparity indexes (34, 35 and 38, respectively).

<sup>1</sup> This was due to its success in obtaining participation on Saint Paul Housing and Redevelopment projects (21% MBE/WBE). The balance of City of Saint Paul procurement showed MBE/WBE participation in the range of Hennepin County, the City of Minneapolis, Admin and MAC.

Figure 9-2.

Disparity index for participating entity procurements for July 2011–June 2016



Note: Number of contracts/subcontracts analyzed is 125,474.

Disparity index =  $100 \times \text{Utilization/Availability}$ .

Source: Keen Independent from participating entity procurements, July 2011–June 2016.

**Utilization for entities combined.** Figures 9-3 through 9-7 examine procurement dollars for combined entities.

**Overall results.** Adding procurement dollars across entities, MBE/WBEs received 10.35 percent of contract dollars. MBE utilization was 3.02 percent and WBE participation was 7.32 percent. These results include certified and non-certified companies.

The bottom portion of Figure 9-3 presents the number and dollars of procurements going to firms that were certified under the respective entity's programs at the time of the procurement award, including companies owned by persons with disabilities, veteran-owned businesses, SBEs certified under CERT, and businesses certified for participation in Admin's Economically Disadvantaged Small Business Procurement Program. Certified firms accounted for 7.03 percent of participating entity procurement dollars. Most of the dollars going to certified firms went to white women-owned businesses (3.11%) and majority-owned companies (2.14%).

Figure 9-3.  
Utilization of minority- and women-owned firms in combined participating entity procurements,  
July 2011–June 2016

|                           | Number of<br>procurements* | \$1,000s             | Percent of<br>dollars |
|---------------------------|----------------------------|----------------------|-----------------------|
| <b>Business ownership</b> |                            |                      |                       |
| African American-owned    | 1,170                      | \$ 72,014            | 0.60 %                |
| Asian American-owned      | 1,643                      | 167,006              | 1.39                  |
| Hispanic American-owned   | 638                        | 38,688               | 0.32                  |
| Native American-owned     | 493                        | 83,623               | 0.70                  |
| Unknown MBE               | 37                         | 1,286                | 0.01                  |
| Total MBE                 | 3,981                      | \$ 362,616           | 3.02 %                |
| WBE (white women-owned)   | 15,181                     | 877,963              | 7.32                  |
| <b>Total MBE/WBE</b>      | <b>19,162</b>              | <b>\$ 1,240,579</b>  | <b>10.35 %</b>        |
| Majority-owned            | 106,312                    | 10,750,902           | 89.65                 |
| <b>Total</b>              | <b>125,474</b>             | <b>\$ 11,991,481</b> | <b>100.00 %</b>       |
| <b>Certified</b>          |                            |                      |                       |
| African American-owned    | 406                        | \$ 32,295            | 0.27 %                |
| Asian American-owned      | 905                        | 88,417               | 0.74                  |
| Hispanic American-owned   | 352                        | 21,224               | 0.18                  |
| Native American-owned     | 223                        | 70,268               | 0.59                  |
| Total MBE                 | 1,886                      | \$ 212,204           | 1.77 %                |
| WBE (white women-owned)   | 5,800                      | 373,319              | 3.11                  |
| Majority-owned            | 2,439                      | 257,049              | 2.14                  |
| <b>Total certified</b>    | <b>10,125</b>              | <b>\$ 842,574</b>    | <b>7.03 %</b>         |
| Non-certified             | 115,349                    | 11,148,906           | 92.97                 |
| <b>Total</b>              | <b>125,474</b>             | <b>\$ 11,991,481</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

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

Source: Keen Independent from data on participating entity procurements July 2011-June 2016.

**Construction.** Figure 9-4 presents utilization of minority- and women-owned firms in construction contracts (including subcontractors) for all entities combined. (Note that some construction projects are classified under “professional services” because the prime contractor was a construction management firm.)

- As shown in the top portion of Figure 9-4, 11.50 percent of construction contract dollars went to MBE/WBEs.
- The bottom portion of Figure 9-4 provides results for certified firms.  
White male-owned businesses that were certified received 3.84 percent of contract dollars, followed by certified firms that were white women-owned (3.76%).

Figure 9-4.

Utilization of minority- and women-owned firms in combined participating entity construction contracts, July 2011–June 2016

|                           | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b> |                            |                     |                       |
| African American-owned    | 391                        | \$ 19,708           | 0.39 %                |
| Asian American-owned      | 317                        | 64,594              | 1.28                  |
| Hispanic American-owned   | 340                        | 23,505              | 0.47                  |
| Native American-owned     | 289                        | 79,148              | 1.57                  |
| Unknown MBE               | 14                         | 1,045               | 0.02                  |
| Total MBE                 | 1,351                      | \$ 188,000          | 3.73 %                |
| WBE (white women-owned)   | 4,352                      | 391,158             | 7.77                  |
| <b>Total MBE/WBE</b>      | <b>5,703</b>               | <b>\$ 579,158</b>   | <b>11.50 %</b>        |
| Majority-owned            | 21,105                     | 4,456,407           | 88.50                 |
| <b>Total</b>              | <b>26,808</b>              | <b>\$ 5,035,565</b> | <b>100.00 %</b>       |
| <b>Certified</b>          |                            |                     |                       |
| African American-owned    | 212                        | \$ 9,129            | 0.18 %                |
| Asian American-owned      | 194                        | 40,232              | 0.80                  |
| Hispanic American-owned   | 209                        | 14,804              | 0.29                  |
| Native American-owned     | 184                        | 68,630              | 1.36                  |
| Total MBE                 | 799                        | \$ 132,795          | 2.64 %                |
| WBE (white women-owned)   | 2,374                      | 189,378             | 3.76                  |
| White male-owned          | 1,222                      | 193,362             | 3.84                  |
| <b>Total certified</b>    | <b>4,395</b>               | <b>\$ 515,535</b>   | <b>10.24 %</b>        |
| Non-certified             | 22,413                     | 4,520,030           | 89.76                 |
| <b>Total</b>              | <b>26,808</b>              | <b>\$ 5,035,565</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on participating entity procurements July 2011–June 2016.

**Professional services.** Figure 9-5 examines utilization of minority- and women-owned firms for professional services contracts (which includes construction when the prime was a construction management company) for all entities combined. MBEs received 3.17 percent of professional services procurement dollars and WBEs received 8.13 percent of those dollars.

Asian American-owned companies accounted for most of the MBE participation.

Of the combined MBE/WBE utilization of 11.30 percent, certified MBE/WBEs accounted for 5.25 percentage points. White male-owned firms that were certified under a participating entity program received 1.07 percent of professional services dollars.

Figure 9-5.

Utilization of minority- and women-owned firms in combined participating entity professional services contracts, July 2011–June 2016

|                           | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b> |                            |                     |                       |
| African American-owned    | 533                        | \$ 18,073           | 0.50 %                |
| Asian American-owned      | 854                        | 84,258              | 2.33                  |
| Hispanic American-owned   | 155                        | 10,785              | 0.30                  |
| Native American-owned     | 29                         | 1,359               | 0.04                  |
| Unknown MBE               | 6                          | 138                 | 0.00                  |
| <b>Total MBE</b>          | <b>1,577</b>               | <b>\$ 114,613</b>   | <b>3.17 %</b>         |
| WBE (white women-owned)   | 3,489                      | 293,860             | 8.13                  |
| <b>Total MBE/WBE</b>      | <b>5,066</b>               | <b>\$ 408,473</b>   | <b>11.30 %</b>        |
| Majority-owned            | 25,758                     | 3,206,791           | 88.70                 |
| <b>Total</b>              | <b>30,824</b>              | <b>\$ 3,615,264</b> | <b>100.00 %</b>       |
| <b>Certified</b>          |                            |                     |                       |
| African American-owned    | 62                         | \$ 3,593            | 0.10 %                |
| Asian American-owned      | 441                        | 37,969              | 1.05                  |
| Hispanic American-owned   | 66                         | 4,815               | 0.13                  |
| Native American-owned     | 3                          | 300                 | 0.01                  |
| <b>Total MBE</b>          | <b>572</b>                 | <b>\$ 46,677</b>    | <b>1.29 %</b>         |
| WBE (white women-owned)   | 1,685                      | 143,075             | 3.96                  |
| White male-owned          | 235                        | 38,804              | 1.07                  |
| <b>Total certified</b>    | <b>2,492</b>               | <b>\$ 228,556</b>   | <b>6.32 %</b>         |
| Non-certified             | 28,332                     | 3,386,708           | 93.68                 |
| <b>Total</b>              | <b>30,824</b>              | <b>\$ 3,615,264</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on participating entity procurements July 2011–June 2016.

Goods. MBE/WBE participation was 7.03 percent for goods purchases for all entities combined. MBEs received 0.79 percent and WBEs received 6.23 percent of goods procurement dollars.

As shown in Figure 9-6 below, certified firms received 2.30 percent of goods dollars, of which 1.47 percentage points was utilization of MBE/WBEs that were certified and 0.83 percentage points was participation of certified firms owned by white men.

Figure 9-6.

Utilization of minority- and women-owned firms in combined participating entity goods contracts, July 2011–June 2016

|                           | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b> |                            |                     |                       |
| African American-owned    | 84                         | \$ 5,926            | 0.30 %                |
| Asian American-owned      | 248                        | 7,918               | 0.40                  |
| Hispanic American-owned   | 27                         | 1,533               | 0.08                  |
| Native American-owned     | 30                         | 325                 | 0.02                  |
| Unknown MBE               | 5                          | 50                  | 0.00                  |
| Total MBE                 | 394                        | \$ 15,752           | 0.79 %                |
| WBE (white women-owned)   | 5,547                      | 123,934             | 6.23                  |
| <b>Total MBE/WBE</b>      | <b>5,941</b>               | <b>\$ 139,686</b>   | <b>7.03 %</b>         |
| Majority-owned            | 42,299                     | 1,848,232           | 92.97                 |
| <b>Total</b>              | <b>48,240</b>              | <b>\$ 1,987,918</b> | <b>100.00 %</b>       |
| <b>Certified</b>          |                            |                     |                       |
| African American-owned    | 69                         | \$ 4,851            | 0.24 %                |
| Asian American-owned      | 132                        | 4,722               | 0.24                  |
| Hispanic American-owned   | 18                         | 129                 | 0.01                  |
| Native American-owned     | 8                          | 207                 | 0.01                  |
| Total MBE                 | 227                        | \$ 9,909            | 0.50 %                |
| WBE (white women-owned)   | 968                        | 19,310              | 0.97                  |
| White male-owned          | 826                        | 16,560              | 0.83                  |
| <b>Total certified</b>    | <b>2,021</b>               | <b>\$ 45,779</b>    | <b>2.30 %</b>         |
| Non-certified             | 46,219                     | 1,942,139           | 97.70                 |
| <b>Total</b>              | <b>48,240</b>              | <b>\$ 1,987,918</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on participating entity procurements July 2011–June 2016.

Other services. Figure 9-7 outlines participation of minority- and women-owned firms in other services contracts (services other than professional services) for all entities combined. MBE/WBE utilization was 8.37 percent for other services procurements. Participation was highest for white women-owned firms (5.10%) and African American-owned firms (2.09%).

Certified firms, in total, received 3.90 percent of other services procurement dollars. Of the certified firms, most of the utilization was minority- and women-owned companies.

Figure 9-7.

Utilization of minority- and women-owned firms in combined participating entity other services contracts, July 2011–June 2016

|                           | Number of<br>procurements* | \$1,000s            | Percent of<br>dollars |
|---------------------------|----------------------------|---------------------|-----------------------|
| <b>Business ownership</b> |                            |                     |                       |
| African American-owned    | 162                        | \$ 28,309           | 2.09 %                |
| Asian American-owned      | 224                        | 10,240              | 0.76                  |
| Hispanic American-owned   | 116                        | 2,863               | 0.21                  |
| Native American-owned     | 145                        | 2,791               | 0.21                  |
| Unknown MBE               | 12                         | 53                  | 0.00                  |
| Total MBE                 | 659                        | \$ 44,256           | 3.27 %                |
| WBE (white women-owned)   | 1,793                      | 69,010              | 5.10                  |
| <b>Total MBE/WBE</b>      | <b>2,452</b>               | <b>\$ 113,266</b>   | <b>8.37 %</b>         |
| Majority-owned            | 17,150                     | 1,239,464           | 91.63                 |
| <b>Total</b>              | <b>19,602</b>              | <b>\$ 1,352,730</b> | <b>100.00 %</b>       |
| <b>Certified</b>          |                            |                     |                       |
| African American-owned    | 63                         | \$ 14,722           | 1.09 %                |
| Asian American-owned      | 138                        | 5,494               | 0.41                  |
| Hispanic American-owned   | 59                         | 1,479               | 0.11                  |
| Native American-owned     | 28                         | 1,130               | 0.08                  |
| Total MBE                 | 288                        | \$ 22,825           | 1.69 %                |
| WBE (white women-owned)   | 773                        | 21,556              | 1.59                  |
| White male-owned          | 156                        | 8,324               | 0.62                  |
| <b>Total certified</b>    | <b>1,217</b>               | <b>\$ 52,705</b>    | <b>3.90 %</b>         |
| Non-certified             | 18,385                     | 1,300,025           | 96.10                 |
| <b>Total</b>              | <b>19,602</b>              | <b>\$ 1,352,730</b> | <b>100.00 %</b>       |

Note: \*Number of prime contracts, subcontracts and other procurements.

Numbers may not add to totals due to rounding.

Source: Keen Independent from data on participating entity procurements July 2011–June 2016.

## B. Disparity Analysis for Participating Entity Procurement

Figures 9-8 and 9-9 provide a scan of disparity results by industry for each participating entity.

**Disparity results.** Figure 9-8 summarizes results of the disparity analysis for participating entities that provide preferences to TGBs — Admin, Minnesota State, MnDOT, MAC and MMCD. As shown, even with the program, there was a pattern of substantial disparities across MBE/WBE groups across industries. (See Chapter 7 for a definition of “substantial disparity.”)

One exception for these entities was Asian American-owned professional services firms, for each there was a substantial disparity for two of the five entities. This was in part due to the success of entity efforts to encourage participation in areas such as IT consulting.

Figure 9-8.

Summary of disparity analysis results for participating entity by industry, July 2011–June 2016, Admin, Minnesota State, MnDOT, MAC and MMCD

|                              | Admin        | Minnesota State | MnDOT        | MAC             | MMCD            |
|------------------------------|--------------|-----------------|--------------|-----------------|-----------------|
| <b>Construction</b>          |              |                 |              |                 |                 |
| African American-owned       | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| Asian American-owned         | Substantial  | No disparity    | No disparity | Small disparity | Substantial     |
| Hispanic American-owned      | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| Native American-owned        | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial     | Substantial  | Small disparity | Substantial     |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| <b>Professional services</b> |              |                 |              |                 |                 |
| African American-owned       | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| Asian American-owned         | No disparity | Substantial     | No disparity | No disparity    | Substantial     |
| Hispanic American-owned      | Substantial  | Substantial     | No disparity | Substantial     | Substantial     |
| Native American-owned        | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial     | Substantial  | Substantial     | Substantial     |
| <b>Goods</b>                 |              |                 |              |                 |                 |
| African American-owned       | Substantial  | Substantial     |              | Substantial     | Substantial     |
| Asian American-owned         | Substantial  | Substantial     |              | No disparity    | Substantial     |
| Hispanic American-owned      | Substantial  | Substantial     |              | Substantial     | Substantial     |
| Native American-owned        | Substantial  | Substantial     |              | Substantial     | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial     |              | Substantial     | No disparity    |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial     |              | Substantial     | Small disparity |
| <b>Other services</b>        |              |                 |              |                 |                 |
| African American-owned       | Substantial  | Substantial     |              | Small disparity | Substantial     |
| Asian American-owned         | Substantial  | Substantial     |              | Substantial     | Substantial     |
| Hispanic American-owned      | Substantial  | Substantial     |              | Substantial     | No disparity    |
| Native American-owned        | Substantial  | No disparity    |              | Substantial     | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial     |              | No disparity    | Substantial     |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial     |              | No disparity    | Substantial     |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Admin, Minnesota State, MnDOT, MAC and MMCD procurements, including subcontracts.



Figure 9-9 summarizes results of the disparity analyses for entities operating other programs to assist MBE/WBEs and other small businesses. The figure shows a strong pattern of disparities across MBE/WBE groups for these entities, even with programs in place. Exceptions to this pattern were Asian American-owned construction businesses (largely due to one formerly CERT-certified firm that had work with multiple entities) and Asian American-owned other services companies. In some instances, a lack of disparity for a group might indicate a positive impact of programs for certain businesses.

Figure 9-9.

Summary of disparity analysis results for participating entity by industry, July 2011–June 2016, Met Council, City of Minneapolis, City of Saint Paul and Hennepin County

|                              | Met Council  | City of Minneapolis | City of Saint Paul | Hennepin County |
|------------------------------|--------------|---------------------|--------------------|-----------------|
| <b>Construction</b>          |              |                     |                    |                 |
| African American-owned       | Substantial  | Substantial         | Substantial        | Substantial     |
| Asian American-owned         | No disparity | No disparity        | No disparity       | No disparity    |
| Hispanic American-owned      | Substantial  | Substantial         | Substantial        | Small disparity |
| Native American-owned        | Substantial  | No disparity        | Substantial        | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial         | Small disparity    | Substantial     |
| <b>Total MBE/WBE</b>         | Substantial  | Small disparity     | Small disparity    | Substantial     |
| <b>Professional services</b> |              |                     |                    |                 |
| African American-owned       | Substantial  | Substantial         | Substantial        | Substantial     |
| Asian American-owned         | No disparity | Substantial         | Substantial        | No disparity    |
| Hispanic American-owned      | Substantial  | Substantial         | Substantial        | Substantial     |
| Native American-owned        | Substantial  | Substantial         | Substantial        | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial         | No disparity       | Small disparity |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial         | Substantial        | Substantial     |
| <b>Goods</b>                 |              |                     |                    |                 |
| African American-owned       | Substantial  | Substantial         | Substantial        | Substantial     |
| Asian American-owned         | Substantial  | Substantial         | Substantial        | Substantial     |
| Hispanic American-owned      | No disparity | Substantial         | Substantial        | Substantial     |
| Native American-owned        | Substantial  | Substantial         | Substantial        | Substantial     |
| WBE (white women-owned)      | Substantial  | Substantial         | Substantial        | Substantial     |
| <b>Total MBE/WBE</b>         | Substantial  | Substantial         | Substantial        | Substantial     |
| <b>Other services</b>        |              |                     |                    |                 |
| African American-owned       | No disparity | Substantial         | Substantial        | Substantial     |
| Asian American-owned         | No disparity | No disparity        | Substantial        | No disparity    |
| Hispanic American-owned      | Substantial  | No disparity        | Substantial        | Substantial     |
| Native American-owned        | Substantial  | Substantial         | Substantial        | No disparity    |
| WBE (white women-owned)      | Substantial  | No disparity        | Small disparity    | Substantial     |
| <b>Total MBE/WBE</b>         | No disparity | No disparity        | Substantial        | Substantial     |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for Met Council, City of Minneapolis, City of Saint Paul and Hennepin County procurements, including subcontracts.

**Businesses eligible for Hennepin County SBE Program.** Hennepin County was the only entity that did not operate a race- and gender-conscious program during the study period. The CERT Directory is the pool of eligible firms for the County's SBE program, and nearly 70 percent of certified firms are MBE/WBE companies, very different from the composition of the Twin Cities marketplace. This might be because race- and gender-conscious programs operated by other local governments using CERT certification drew relatively more MBE/WBEs to become CERT-certified.

Figure 9-10 shows the distribution of companies in the CERT Directory by ownership of firm.

Figure 9-10.

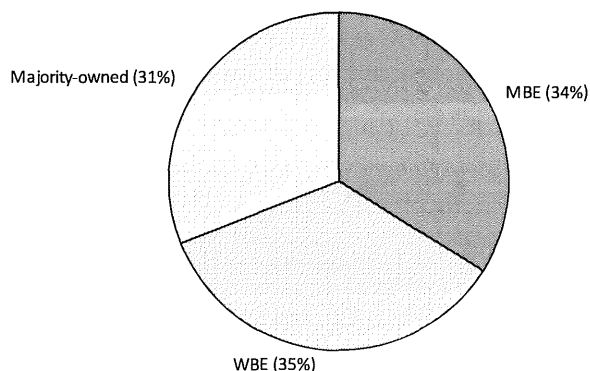
Minority, white women- and white male-owned small businesses certified under CERT, 2017

Note:

1,755 businesses examined in CERT Directory.

Source:

Keen Independent from CERT Directory, 2017.



### C. Disparity Results for Combined Entity Procurement

The study team also analyzed whether there were disparities between MBE/WBE utilization and availability for entity procurement combined.

**Overall results.** The combined utilization of minority- and women-owned firms in participating entity procurement during the study period — 10.35 percent of total procurement dollars — was below the 19.85 percent that might be expected from the availability analysis. Figure 9-10 presents these overall results from the disparity analysis. (The study team followed the procedures described in Chapter 6 to determine availability benchmarks for the combined entities.)

The resulting disparity index for MBE/WBEs is 52. The disparity occurred even though eight of the nine entities operated race- and gender-based programs during this time period and the ninth entity drew from a pool of certified firms that was largely MBE/WBEs.

Figure 9-11.  
MBE/WBE utilization and availability for  
combined entity procurements,  
July 2011–June 2016

Note:

125,474 procurements analyzed.

Source:

Keen Independent utilization and availability analyses for  
combined entity procurements.

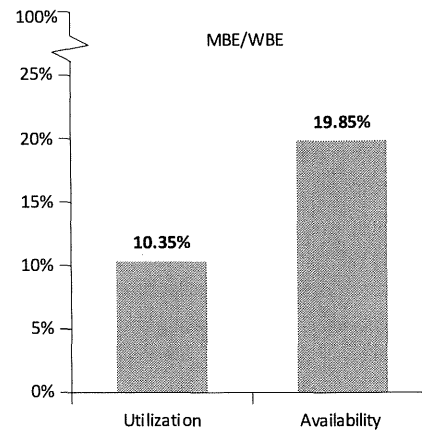


Figure 9-12 shows utilization, availability and disparity results for individual MBE groups as well as white women-owned firms. There were substantial disparities for white women-owned firms and for each MBE group except for Asian American-owned companies (mostly because of one formerly CERT-certified company).

Figure 9-12.

Disparity analysis for participating entity procurements, July 2011-June 2016

|                         | Utilization    | Availability   | Disparity index |
|-------------------------|----------------|----------------|-----------------|
| African American-owned  | 0.60 %         | 2.79 %         | 22              |
| Asian American-owned    | 1.39           | 1.22           | 114             |
| Hispanic American-owned | 0.32           | 0.90           | 36              |
| Native American-owned   | 0.70           | 2.32           | 30              |
| Unknown MBE             | 0.01           |                |                 |
| <b>Total MBE</b>        | <b>3.02 %</b>  | <b>7.23 %</b>  | <b>42</b>       |
| WBE (white women-owned) | 7.32           | 12.62          | 58              |
| <b>Total MBE/WBE</b>    | <b>10.35 %</b> | <b>19.85 %</b> | <b>52</b>       |

Note: Disparity index =  $100 \times \text{Utilization} / \text{Availability}$ .

Source: Keen Independent utilization and availability analyses for participating entity procurements.

**Disparity analyses for each industry.** Keen Independent also reviewed results for each of the four major industries. Figure 9-13 provides these results.

**Construction.** MBE/WBE utilization of 11.50 percent in construction contracts was less than the 18.36 percent that might be expected from the availability analysis for those contracts.<sup>2</sup> The resulting disparity index was 63, indicating a substantial disparity.

There were substantial disparities between utilization and availability for African American-, Hispanic American-, Native American- and white women-owned construction firms. Utilization exceeded availability for Asian American-owned construction companies because of work obtained across entities obtained by a formerly CERT-certified firm.

The lack of disparities for Asian American-owned firms may be due to the positive impact of current and past programs for certain firms. Overall, the disparity between MBE/WBE utilization and availability was least severe for construction contracts. Contract goals programs, which most entities employ for their construction contracts, appear to increase MBE/WBE utilization.

**Professional services.** MBE/WBE participation in professional service contracts (11.30%) was below the availability benchmark for those contracts (21.36%). The disparity analysis for professional services procurement indicates a substantial disparity (disparity index of 53).

Figure 9-13 shows substantial disparities for each MBE/WBE group except for Asian American- owned firms. This may reflect the success of some entities in encouraging participation of certified firms in specific types of professional services work such as IT consulting.

**Goods.** About 7.03 percent of goods procurement dollars went to MBE/WBEs, substantially below the 18.92 percent that might be anticipated from the availability analysis (disparity index of 37). There was very little participation of minority-owned companies in entity goods procurement. There were substantial disparities for each MBE group and for white women-owned firms.

It is instructive that participating entity programs were least well-developed for goods procurements. For example, contract goals programs typically are not applicable to goods purchases as most do not have subcontracting opportunities.

**Other services.** For other services procurements, MBE/WBE utilization (8.37%) was also below what might be expected from the availability analysis (13.93%). The disparity index was 60. There were disparities for each MBE/WBE group, and they were substantial for each group except for Asian American-owned businesses.

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<sup>2</sup> Note that 0.02 percent of construction dollars went to MBEs for which race and ethnicity could not be determined. This utilization is only included in the totals for MBEs and not in the other disparity calculations. It does not affect the results for individual minority groups.

Figure 9-13.

Disparity analysis for combined participating entity procurements, by industry,  
July 2011–June 2016

|                              | Utilization    | Availability   | Disparity<br>index |
|------------------------------|----------------|----------------|--------------------|
| <b>Construction</b>          |                |                |                    |
| African American-owned       | 0.39 %         | 1.80 %         | 22                 |
| Asian American-owned         | 1.28           | 0.65           | 196                |
| Hispanic American-owned      | 0.47           | 0.83           | 57                 |
| Native American-owned        | 1.57           | 3.76           | 42                 |
| Unknown MBE                  | 0.02           | 0.00           |                    |
| Total MBE                    | 3.73 %         | 7.04 %         | 53                 |
| WBE (white women-owned)      | 7.77           | 11.33          | 69                 |
| <b>Total MBE/WBE</b>         | <b>11.50 %</b> | <b>18.36 %</b> | <b>63</b>          |
| <b>Professional services</b> |                |                |                    |
| African American-owned       | 0.50 %         | 3.60 %         | 14                 |
| Asian American-owned         | 2.33           | 2.13           | 110                |
| Hispanic American-owned      | 0.30           | 0.62           | 48                 |
| Native American-owned        | 0.04           | 1.34           | 3                  |
| Unknown MBE                  | 0.00           | 0.00           |                    |
| Total MBE                    | 3.17 %         | 7.68 %         | 41                 |
| WBE (white women-owned)      | 8.13           | 13.68          | 59                 |
| <b>Total MBE/WBE</b>         | <b>11.30 %</b> | <b>21.36 %</b> | <b>53</b>          |
| <b>Goods</b>                 |                |                |                    |
| African American-owned       | 0.30 %         | 2.47 %         | 12                 |
| Asian American-owned         | 0.40           | 1.11           | 36                 |
| Hispanic American-owned      | 0.08           | 1.56           | 5                  |
| Native American-owned        | 0.02           | 0.19           | 11                 |
| Unknown MBE                  | 0.00           | 0.00           |                    |
| Total MBE                    | 0.79 %         | 5.34 %         | 15                 |
| WBE (white women-owned)      | 6.23           | 13.57          | 46                 |
| <b>Total MBE/WBE</b>         | <b>7.03 %</b>  | <b>18.92 %</b> | <b>37</b>          |
| <b>Other services</b>        |                |                |                    |
| African American-owned       | 2.09 %         | 4.21 %         | 50                 |
| Asian American-owned         | 0.76           | 0.86           | 89                 |
| Hispanic American-owned      | 0.21           | 0.68           | 31                 |
| Native American-owned        | 0.21           | 0.29           | 73                 |
| Unknown MBE                  | 0.00           | 0.00           |                    |
| Total MBE                    | 3.27 %         | 6.03 %         | 54                 |
| WBE (white women-owned)      | 5.10           | 7.90           | 65                 |
| <b>Total MBE/WBE</b>         | <b>8.37 %</b>  | <b>13.93 %</b> | <b>60</b>          |

Note: Disparity index = 100 x Utilization/Availability.

Source: Keen Independent utilization and availability analyses for participating entity procurements, including subcontracts.

**Statistical significance of disparity Analysis results.** As discussed in Chapter 7, analysis of statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences.

The study team used a statistical simulation tool to examine whether there were a sufficient number of procurements examined to be confident that results indicating disparities for combined entities could not be easily replicated by chance in contract awards (see discussion of Monte Carlo analysis in Chapter 7).

Figure 9-14 presents the results as they relate to the statistical significance of disparities identified for MBEs and WBEs for the combined participating entities.

- The Monte Carlo simulations did not replicate the disparity for MBEs in any of the 10,000 simulation runs. Therefore, one can be confident that chance in contract and subcontract awards can be rejected as an explanation for the observed disparity for minority-owned businesses in combined entity contracts.
- The Monte Carlo simulations also did not replicate the disparity for white women-owned firms in any of the 10,000 simulation runs. Applying a 95 percent confidence level for “statistical significance,” the disparity for white women-owned firms is statistically significant, and one can reject chance in contract awards as the explanation of the disparity.

Figure 9-14.

Monte Carlo results for MBEs and WBEs for combined entity procurements, July 2011–June 2016

|  | MBE     | WBE     |
|--|---------|---------|
| Disparity index  | 42      | 58      |
| Number of simulation runs out of 10,000 that replicated observed utilization | 0       | 0       |
| Probability of observed disparity occurring due to "chance"                  | < 0.1 % | < 0.1 % |
| Reject chance in awards of contracts as a cause of disparity?                | Yes     | Yes     |

Source: Keen Independent from Monte Carlo model for participating entity procurements.

## **CHAPTER 10.**

### **Summary of Results and Conclusions**

Chapter 10 summarizes study results in the form of answers to key questions (Part A). Results for businesses owned by persons with disabilities and by veterans are outlined in Part B of Chapter 10. Keen Independent presents recommendations in Part C. Many of these recommendations apply across participating entities. Those specific to Admin are outlined at the end of Chapter 10.

#### **A. Answers to Questions about Conditions for Minority- and Women-owned Firms**

The study conclusions draw upon results explained in the report chapters and appendices. As it makes decisions on its future programs, Admin should review other relevant information as well.

Keen Independent organized key results in the form of answers to the following questions:

1. Did the disparity study identify barriers for minorities and women related to business opportunities?
2. Is there evidence that race and gender discrimination is a factor in those barriers?
3. Have entity programs eliminated identified barriers?
4. Have entity programs helped to remove barriers?
5. Can neutral programs alone remedy the effects of discrimination?
6. Are there tools for removing barriers that participating entities have not fully employed?
7. Are there operational requirements for defensible race- and gender-conscious programs?

#### **1. Did the disparity study identify barriers for minorities and women related to business opportunities?**

Yes. Key results presented in this report include the following.

a. There are fewer minority- and women-owned businesses in Minnesota than there might be if opportunities for entry, advancement and business ownership were equal. There is evidence of unequal employment opportunities and business ownership opportunities that have the effect of depressing current availability of minority-owned firms and especially for female-owned companies.

- There are barriers to entry and advancement for minorities and women as employees within local industries, especially for African Americans, Asian Americans, Native Americans and women in construction. Some construction trades studied were nearly all-white and all-male.

- There are barriers to business formation, especially for women working in the construction, professional services and goods industries and African Americans working in the other services industry.
- There are barriers regarding access to capital and bonding for minorities and women that affect the ability of minorities and women to successfully start and sustain businesses.

b. Among the minority- and women-owned firms in business and available for public sector work, there is evidence of disparities in the size of the largest procurements companies bid.

MBEs and WBEs had lower bid capacity than comparable majority-owned firms. Disparities in bid capacity negatively affect the opportunity for minority- and women-owned firms to compete for larger public sector procurements and subcontracts.

c. There is evidence that minority- and women-owned firms do not face a level playing field for public sector procurement in Minnesota.

- Some of the requirements to be able to bid on and win public sector procurements reduce opportunities for small businesses in general, which has a disparate impact on minority- and women-owned firms.
- There were substantial disparities between MBE/WBE utilization and availability in participating entity procurement.
- In addition, there was a pattern of disparities across minority groups and women when individually examining the construction, professional services, goods and other services industries. Any exceptions to the pattern for Admin procurement are discussed later in Chapter 10.

d. There was evidence of disparities related to marketplace conditions across minority groups examined in the study. There was evidence of disparities in the local marketplace for businesses owned by each minority group. For example, there was lower annual revenue for African American-, Asian American-, Hispanic American- and Native American-owned businesses across each of the four industries.

There was a pattern of disparities for women-owned companies as well.

## **2. Is there evidence that race and gender discrimination is a factor in those barriers?**

Yes.

The disparities identified for minority- and women-owned firms in public sector procurement were substantial. In most cases, chance can be rejected as a cause of the disparities. As discussed in Appendix B, courts have held that such statistically significant and substantial disparities can constitute an inference of discrimination.



Some of the business owners and others interviewed in the study indicated negative stereotypes and other evidence of race and gender discrimination.

- Some interviewees indicated that it was more difficult to start a business as a minority or a woman. There were comments consistent with implicit bias being a common barrier for minorities and women starting businesses. Some individuals discussed the difficulty of starting a business and being successful when they were one of the only minorities in a particular field.
- Many interviewees discussed the self-reinforcing barriers of limited capital, unequal access to financing and, for construction firms, having the work they bid on be dictated by being able to obtain a bond.
- There is evidence that these barriers negatively affect current availability of MBEs and WBEs, and may foster work environments in which negative stereotypes of minorities and women are created. This includes perceptions that minority- and women-owned firms “don’t belong” in certain fields in Minnesota.

There is both evidence of private sector marketplace discrimination, as discussed above, and evidence of a linkage between participating entities and that marketplace.

- Each one of the participating entities primarily procure construction, professional services, goods and other services from firms located within the local area and therefore infuse public tax dollars into the local marketplace.
- To the extent there is evidence of private marketplace discrimination affecting minority- and women-owned firms, there may be entities that are passive participants in such discrimination.
- Courts have held that a public entity may remedy the effects of such private marketplace discrimination, and that public entities have a compelling interest assuring that public dollars do not serve to finance the private prejudice. (See Appendix B.)

### **3. Have entity programs eliminated identified barriers?**

No.

Through a combination of neutral and race- and gender-conscious measures, entities have attempted to address barriers to minority- and women-owned business participation in their procurement. Some participating entity efforts include capacity-building for minority- and women-owned firms and other small businesses. This assistance includes partnering with other public sector, not-for-profit and private sector groups.

Although they may be helpful, the collective efforts of participating entities, not-for-profit organizations and other groups have not eliminated the barriers to entry and advancement, business formation and success, access to capital and bonding, and other factors.

Combining the results for participating entities:

- MBEs obtained 3.02 percent of procurement dollars during the study period. This utilization was substantially less than the 7.23 percent participation that might be expected from the availability analysis. The disparity was substantial (disparity index of 42) and statistically significant.
- White women-owned firms received 7.32 percent of participating entity procurement dollars, less than the 12.623 percent that might be expected from the availability analysis (disparity index of 58). This disparity is also statistically significant.

In sum, MBE/WBEs received just over one-half of the amount of participating entity contract dollars that one might expect given a level playing field for those companies.

#### **4. Have entity programs helped to remove barriers?**

Yes.

Entities that had programs in place for the entire study period or had more fully implemented programs had better results:

- Utilization ranged from 11 to 16 percent, and their disparity indices were from 51 to 76. MBE/WBE participation for these entities — the City of Minneapolis, City of Saint Paul, Admin, Metropolitan Airports Commission and Hennepin County — was higher than for other participating entities.
- Some participating entities had programs that were new or that had done less to fully implement them. MBE/WBE utilization ranged from 3 to 8 percent for these entities, with disparity indices of 34 to 41. Such entities include Minnesota State, MnDOT, Metropolitan Mosquito Control District and the Metropolitan Council.

More program elements are in place for construction contracts than other types of procurement.

- On balance, the disparity between utilization and availability was lowest for participating entity construction contracts — utilization of 11.50 percent and disparity index of 63 for combined participating entities.
- Utilization was lowest (7.03%) and disparity greatest (disparity index of 37) for goods purchases. Some participating entities had no race- and gender-conscious programs in place to encourage MBE/WBE utilization for goods procurement.

#### **5. Can neutral programs alone remedy the effects of discrimination?**

Disparity study results suggest “no.”

Many entities already implement small business enterprise (SBE) programs and other neutral efforts. Even with such neutral measures and certain race- and gender-conscious programs, there were disparities in the overall utilization of MBEs and of WBEs for each of the participating entities.

The one participating entity that solely relied on neutral programs, Hennepin County, did not eliminate disparities in its MBE/WBE utilization. MBE/WBE utilization was 10.61 percent and availability was 17.68 percent for Hennepin County, and the resulting disparity index was 60. This occurred even with:

- A growing set of neutral programs at the County; and
- Its use of the CERT directory to determine SBE Program eligibility, which is a pool of companies mostly comprised of minority- and women-owned businesses.

There is some evidence across participating entities that preferences for all small businesses tend to dilute the effectiveness of programs for MBE/WBEs. This appears to be true when MBE/WBE preferences are combined with preferences for groups of businesses that are mostly white male-owned (veteran-owned business programs, for example). In many of the programs that combined MBE/WBEs and other small businesses, WBEs and white male-owned firms had the highest utilization, with smaller amounts going to MBEs.

#### **6. Are there tools for removing barriers that have not fully employed?**

Yes, as discussed later in Chapter 10.

Available tools include contract goals, preferences and small purchase programs. There are legal considerations with each of these measures, including those regarding narrow tailoring of MBE programs (see below).

#### **7. Are there operational requirements for defensible race- and gender-conscious programs?**

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis, as discussed in Chapter 2 and Appendix B. The strict scrutiny analysis is comprised of two prongs:

- The program must serve a compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.

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.

**Neutral measures.** Examples of race- and gender-neutral alternatives include 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 to acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>1</sup>

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

Participating entities have implemented many of these neutral efforts, or have coordinated with organizations that do, and should continue to expand them.

**Restricting the geographic scope.** The courts require programs to be limited to the relevant geographic marketplace and entity contracting activities for which there is evidence of discrimination against MBEs. In the *Croson* decision, the U.S. Supreme Court criticized the City of Richmond’s inclusion of minority-owned firms from anywhere in the country. (See Appendix B.)

For statewide entities, this means that a program be limited to eligible firms that have locations within the state. The geographic area might also include the two counties in Wisconsin (Pierce and St. Croix) that are part of the federally-defined Minneapolis-St. Paul Metropolitan Statistical Area.

Limiting the relevant geographic market applicable to an MBE program differs from local business programs that seek to increase an entity’s procurement dollars that go to companies with a primary place of business in a jurisdiction. Although there is not a substantial amount of case law related to local business programs, they can raise constitutional issues that might rise to the strict scrutiny standard of judicial review under the Equal Protection Clause (for example, if they require residency requirements as part of their program eligibility), and potential violations of other constitutional provisions such as the Privileges and Immunities Clause.

**Additional factors considered under narrow tailoring.** As discussed in Appendix B, in addition to the required consideration of the necessity for the relief and the efficacy of alternative race-neutral efforts, the courts require evaluation of additional factors. For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include:

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<sup>1</sup> See e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see Appendix B.

- Built-in flexibility;
- Good faith efforts provisions;
- Waiver provisions;
- A rational basis for goals;
- Graduation provisions;
- Remedies only for groups for which there were findings of discrimination; and
- Sunset provisions.

A significant recent case in this area regarding MBE/WBE/DBE programs in the Eighth Circuit is the decision in *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,<sup>2</sup> which is summarized in Appendix B.

- For example, the Eighth Circuit pointed out the program limits preferences to small businesses falling beneath an earnings threshold. The Eighth Circuit also mentioned the limits in the DBE Program, stating that it contains built-in durational limits, decertification of MBEs who achieve certain levels of success and mandatory review of MBE certification at regular, relatively brief periods.
- The Eighth Circuit found that the “DOT has tied the goals for DBE participation to the relevant labor markets,” insofar as the “regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination.”<sup>3</sup>
- The Eighth Circuit found that narrow tailoring also requires minimizing the burden of the MBE/WBE/DBE program on third parties. The Eighth Circuit noted steps to minimize the race-based nature of the DBE Program by directing its benefits at small businesses owned and controlled by socially and economically disadvantaged individuals. This is further support for applying business size standards when certifying firms as eligible for program benefits.
- A program must also be limited to those racial and ethnic groups identified as having suffered discrimination in the relevant marketplace.

The discussion above reinforces consideration for race-conscious programs to include a size standard as part of certification, regular review of eligibility for certification, and to satisfy all the narrowly tailored factors noted above, such as a provision for graduation from the program, sunset provisions for the program, rational basis for any goals that may set, inclusion only of groups found to have suffered discrimination, waiver provisions, and flexibility in how program elements are applied.

**Intermediate scrutiny for gender-based programs.** Some courts have held programs for women-owned businesses to an intermediate scrutiny standard of legal review. This standard has

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<sup>2</sup> 345 F.3d 964 (8<sup>th</sup> Cir 2003).

<sup>3</sup> *Id.* at 972, *citing*, 49 C.F.R. § 26.45(c)-(d) (Steps 1 and 2); *see also*, *Geyer Signal, Inc.*, 2014 WL 1309092.

similar components to strict scrutiny, but is more easily met. The district court in *Geyer Signal, Inc. v. Minnesota DOT* recognized the intermediate scrutiny standard (see Appendix B).<sup>4</sup>

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

## **B. Results for Businesses Owned by Persons with Disabilities and by Veterans**

The TG/ED/VO Program operated by Admin assists businesses owned by persons with disabilities and veterans. Government programs that assist businesses owned by persons with disabilities or veterans are more easily defended against legal challenge than programs based on a business owner’s race or gender.<sup>5</sup> Therefore, the analyses in the disparity study for businesses owned by persons with disabilities and veterans could just focus on overall marketplace conditions.

Persons with disabilities and veterans in Minnesota are more likely than other groups to own businesses in the study industries. However, there is also evidence that persons with disabilities who own businesses earn less than other business owners in Minnesota. There were small differences in earnings for veterans who own businesses.

## **C. Summary of Recommendations**

Keen Independent recommends that Admin and other participating entities:

1. Work together to address barriers and open opportunities for minority- and women-owned firms and other small businesses;
2. Based on all information available, consider retaining and more fully implementing existing programs;
3. Pursue opportunities for new and better tools to address barriers;
4. Better track and report results on MBE/WBE participation; and
5. Carefully consider study results and other information to determine future program eligibility for each group.

**1. Work together to address barriers and open opportunities for MBE/WBEs and other small businesses.** There is a need for a broad combined effort by participating entities and other partners to address the effects of race and gender discrimination in employment, entrepreneurship and business success. Admin and other participating entities might work together to:

- a. Better communicate procurement opportunities, coordinate outreach efforts, build a joint bidders list and find other ways to reach out to MBE/WBEs and other small businesses. Such efforts should include targeted outreach to minority business

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<sup>4</sup> 2014 W.L. 1309092 at footnote 4, *citations omitted*.

<sup>5</sup> Instead of having to satisfy strict scrutiny or intermediate scrutiny, a state and local government would need only show that it has a “rational basis” for such a program, as discussed in Chapter 2.

communities that have not traditionally been involved in public sector procurement, including immigrant-owned businesses. Participating entities might encourage other federal, state and local government entities and large corporations in Minnesota to join this effort.

- b. Further strengthen local technical assistance, financing, bonding assistance and other capacity-building efforts. This might include additional coordination and referrals to such programs, additional funding and marketing assistance.
- c. Improve virtual assistance portals for businesses in Minnesota, with links to assistance and availability of just-in-time training. The Minnesota Department of Employment and Economic Development's Guide to Starting a Business in Minnesota might be a foundation for expanded online assistance. From in-depth interviews with business owners, knowledge of local business assistance programs is limited. Examples of portals in other communities include:
  - City of San José, California's "BusinessOwnerSpace.com" (BOS).<sup>6</sup> This integrated source of information links startups and existing businesses with assistance providers.
  - KCSOURCELINK, a network of more than 200 nonprofit resource organizations that provide business-building services for small companies in the Kansas City region.<sup>7</sup>
  - Arizona Department of Transportation Business Coach on Demand, where companies can receive just-in-time assistance through online training and videos.<sup>8</sup>
- d. Maintain efforts that enforce non-discrimination in employment as well as further training, employment and advancement for women and people of color in industries that have not been open to all groups in the past. Better pathways for people of color and women to work in industries such as construction are needed for low MBE/WBE availability to be addressed.
- e. Jointly work to streamline and simplify public procurement processes, including unbundling large contracts, removing unnecessary contract specifications, writing procurement documents in plain language, routinely providing feedback to bidders and proposers, and prompt payment.
- f. Share best practices and results of pilot programs among state and local government entities, including those of organizations that did not participate in the Joint Disparity Study. Several participating entities already do this.

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<sup>6</sup> <http://www.businessownerspace.com/>.

<sup>7</sup> <http://www.kcsourcelink.com/home>.

<sup>8</sup> <https://www.azdot.gov/business/ADOT-Business-Coach/learning-about-opportunities>.

- g. Streamline certification, create a one-stop intake portal and pursue reciprocity or joint certification when possible. If possible, certification as an MBE or WBE should not be substantially more difficult than certification as an SBE when an entity simultaneously operates MBE/WBE and SBE programs.
- h. Jointly pursue action by the State Legislature to reduce barriers to public sector procurement embedded in state law. For example:
  - Evaluate whether there could be changes to allow more flexibility in applying bonding and prevailing wage requirements without sacrificing other policy objectives.
  - Allow more use of alternative delivery methods for construction projects, which can substantially increase opportunities for MBE/WBE participation as subcontractors.
  - Modernize insurance requirements and allow more flexibility in other provisions (for example, local governments require insurance amounts specified in state law that appear to be unavailable in the business insurance market).

**2. Based on all information available, consider retaining and more fully implementing existing programs.** Admin's program includes provisions for:

- Price and evaluation preferences;
- Contract goals;
- Encouraging purchases from an TG/ED/VO vendor for procurements under \$5,000;
- An Equity Select program that allows for direct selection of a TG/ED/VO business for purchases over \$5,000 and not greater than \$25,000; and
- The ability to set aside procurements for bidding from certified businesses.

Price and evaluation preferences are applied across Admin procurements, with certain limits. Admin has some flexibility in the size of the preference percentage depending on the item or service being purchased. Admin currently sets contract goals on certain construction contracts but no other types of contracts.

Admin should consider retaining certain of these programs and more broadly implementing them, after reviewing the information it has from this report and other sources, and conducting further legal review. For example:

- a. Setting contract goals for professional and technical services contracts and/or awarding preference points for certified TG/ED/VO participation as subcontractors.
- b. Increasing MBE participation in subcontracts (which was very low) by subdividing overall contract goals for contracts into an MBE portion and an "other TG/ED/VO" portion.



- c. Evaluating whether it can expand its sheltered market program for certain types of procurements above the reach of the Equity Select program. The sheltered market program might be limited to bids from eligible firms where there are least three certified firms that can submit bids or proposals for those procurements.

**3. Pursue opportunities for new and better tools to address barriers.** After reviewing all available information and legal issues, Admin might evaluate and consider seeking authority to:

- a. Increase the maximum amount of the price/evaluation preference (currently up to 6% for certain types of solicitations), the maximum for any price preference (currently \$60,000) for TG/ED/VO businesses (or perhaps just TG businesses), and the types of procurements for which it may be applied (currently not applied to all types of procurements).
- b. Increase the current \$25,000 limit (perhaps to \$50,000) on the Equity Select program that allows for Admin's direct selection of a TG/ED/VO business for small purchases.
- c. Expand specialized prime contractor/prime consultant capacity-building program for specific types of small construction and professional services contracts. Such programs would prequalify eligible companies for participation, streamline the procurement process and require participation of companies in assistance programs as a condition of eligibility. Those companies would compete with one another for different groups of contracts based on their size (competitors would be of similar size and length of time in business). The City of Portland, Oregon Prime Contractor Development Program is an example of this type of initiative.
- d. Ensure that it chooses to employ a race- and gender-neutral approach (such as a program open to all SBEs) and not a race- and gender-based programs when the neutral program might be effective in addressing the identified barriers.

For certain programs, Admin might need eligibility guidelines with revenue limits below that of U.S. Small Business Administration definitions of small business (for example, limiting a prime contractor development program to firms with annual revenue of \$5 million or less).

**4. Better track and report results on MBE/WBE participation.** Admin should develop procedures to record ownership information for its vendors and subcontractors (self-reported) and improve its methods of tracking participation of MBE/WBEs, by group and industry, in its procurement. This should be in addition to new efforts to track and report participation of certified TG business (by race, ethnicity, gender and disability status) and ED/VO businesses. Admin should make annual reports available to the public. It will require new data collection and management systems as well as additional staff resources to implement this recommendation.

With such reports, Admin can monitor whether the participation of any group that is ineligible for the TG/ED/VO Program in a certain industry drops below corresponding availability. If so, Admin might consider reinstating eligibility for that group in that industry. (Such reports will require Admin to request and track ownership information for its vendors.)

**5. Carefully consider study results and other information to determine future program eligibility for each group.** Admin should consider all of the results of the disparity study and other information it has when considering whether to continue to operate race- and gender-conscious programs, and if so, which groups will be eligible for programs in specific industries (construction, professional services, goods and other services).

Figure 10-1 shows results of the disparity analysis for Admin procurement, by MBE/WBE group, in the construction, professional services, goods and other services industries.

- For construction, there were substantial disparities for each MBE/WBE group even though the TG price preference applied and most groups were eligible for the contract goals program. The only group not eligible to participate in the contract goals program, Asian American-owned firms, had utilization substantially below availability.
- For professional services, there were disparities for WBEs and each MBE group, except for Asian American-owned firms. The disparities found were substantial. The TG Program applied to all groups other than African American-owned firms, which were deemed to be ineligible for participation in any professional services subcontract goal program based on the 2009 Disparity Study. Within IT procurements, Admin made additional efforts to include MBE/WBE firms through its SITE program.

Admin might interpret the lack of a disparity for Asian American-owned professional services firms as an indicator of the success of its efforts to increase participation. Utilization of Asian American-owned firms was 0 percent of Admin professional services dollars in 2002-2007 based on the 2009 Disparity Study.

- For goods purchases, there were substantial disparities for WBEs and each MBE group. The TG Program applied to all groups.
- For other services procurements, there were disparities for all groups. The TG Program applied to Hispanic American- and white women-owned companies during the study period, but not other groups.

The above results suggest that the TG Program may have had a positive impact on the utilization of minority- and women-owned firms but disparities persisted. And, all groups previously ineligible for program participation in certain industries showed substantial disparities. Admin's results are consistent with those for other participating entities, as discussed in Chapter 9.

Admin should review this evidence along with other information in the Joint Disparity Study and other sources when considering whether to have future application of race- and gender-conscious programs and eligibility for those programs.

Figure 10-1.

Summary of disparity analysis results for Admin procurements by industry, July 2011–June 2016

|                              | Disparity   | Utilization<br>exceeding<br>availability | Notes                     |
|------------------------------|-------------|--|---------------------------|
| <b>Construction</b>          |             |  |                           |
| African American-owned       | Substantial |  |                           |
| Asian American-owned         | Substantial |  | Were ineligible for goals |
| Hispanic American-owned      | Substantial |  |                           |
| Native American-owned        | Substantial |  |                           |
| WBE (white women-owned)      | Substantial |  |                           |
| <b>Total MBE/WBE</b>         | Substantial |  |                           |
| <b>Professional services</b> |             |  |                           |
| African American-owned       | Substantial |  | Were ineligible for goals |
| Asian American-owned         |             | No disparity                             |                           |
| Hispanic American-owned      | Substantial |  |                           |
| Native American-owned        | Substantial |  |                           |
| WBE (white women-owned)      | Substantial |  |                           |
| <b>Total MBE/WBE</b>         | Substantial |  |                           |
| <b>Goods</b>                 |             |  |                           |
| African American-owned       | Substantial |  |                           |
| Asian American-owned         | Substantial |  |                           |
| Hispanic American-owned      | Substantial |  |                           |
| Native American-owned        | Substantial |  |                           |
| WBE (white women-owned)      | Substantial |  |                           |
| <b>Total MBE/WBE</b>         | Substantial |  |                           |
| <b>Other services</b>        |             |  |                           |
| African American-owned       | Substantial |  | Were ineligible           |
| Asian American-owned         | Substantial |  |                           |
| Hispanic American-owned      | Substantial |  |                           |
| Native American-owned        | Substantial |  |                           |
| WBE (white women-owned)      | Substantial |  |                           |
| <b>Total MBE/WBE</b>         | Substantial |  |                           |

Note: "Ineligible for program" during the study period for that program component, which was based on the Minnesota Department of Administration's review of the 2009 disparity study for State Agencies.

## APPENDIX A.

### Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2017 Minnesota Joint 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”).

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

**Availability analysis.** The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing and able to perform specific types of construction, professional services, goods and other services.

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

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

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

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

**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 <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

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

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

**Consultant.** A consultant is a business performing professional services contracts.

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

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

**Central CERT Certification Program (CERT)** The Central Certification (CERT) Program includes certification for minority-owned businesses (MBEs), women-owned businesses (WBEs) and small businesses (SBEs). Hennepin County, the City of Saint Paul and Ramsey County operate programs that rely on CERT certification. The City of Saint Paul is the lead certification agency for CERT.

**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 individuals 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 and economic disadvantage. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of \$1.32 million excluding equity in the business and primary personal residence).

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

A business owned by a non-minority male may also be certified as a DBE on a case-by-case basis if the enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

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

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

**Disparity index.** A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity” or utilization “on par” with availability. Disparity index figures closer to 0 indicate larger

disparities between utilization and availability. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

**Dun & Bradstreet (D&B).** D&B is the leading global provider of lists of business establishments and other business information (see [www.dnb.com](http://www.dnb.com)). Hoover's is the D&B company that provides these lists. Obtaining a DUNS number and being listed by D&B is free to listed companies; it does not require companies to pay to be listed in its database.

**Economically Disadvantaged Area.** The Minnesota Department of Administration defines an Economically Disadvantaged Area as labor surplus areas, as designated by the federal government, and low-income counties in Minnesota.

**Economically Disadvantaged Small Business (EDSB).** To be certified as an EDSB, the business must be located (or the owner must reside) in an Economically Disadvantaged Area in Minnesota.

**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 Aviation Administration.** The FAA is an agency of the United States Department of Transportation that regulates American civil aviation and provides funds for the construction and operation of airports.

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

**Federal Highway Administration (FHWA).** The FHWA is an agency of the United States Department of Transportation that works with state and local governments to construct, preserve, and improve the National Highway System, other roads eligible for federal aid, and certain roads on federal and tribal lands.

**Federal Transit Administration (FTA).** The FTA is an agency of the United States Department of Transportation that administers federal funding to support local public transportation systems including buses, subways, light rail and passenger ferry boats.

**Firm.** See “business.”

**Federally-funded contract.** A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with 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.

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

**Local agency.** A local agency is a city, county, town or other local 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).

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

**Metropolitan Council Underutilized Business Program (MCUB).** Met Council operates the Metropolitan Council Underutilized Business (MCUB) Program. The purpose of the program is to expand procurement opportunities for minority- and women-owned companies and other small business on its locally-funded contracts. MCUB businesses include Targeted Group businesses, DBEs and veteran-owned businesses certified by Department of Veteran Affairs or by the Department of Administration.

**Minnesota Unified Certification Program (MNUCP).** MNUCP is the group of certifying agencies for DBE certification in the state (see definition of DBE in this appendix). This group includes the City of Minneapolis, Metropolitan Airports Commission, Metropolitan Council and Minnesota Department of Transportation.

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

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

**Minority-owned business (MBE).** An MBE is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, “MBE-certified businesses” are those that have been certified by a government agency as a minority-owned company.

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

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

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

**Participating entity.** One of the state and local governments participating in the Joint Disparity Study.

**Prime consultant.** A prime consultant is a professional services firm that performs a prime contract for an end user.

**Prime contract.** A prime contract is a contract between a prime contractor or a prime consultant and the project owner.

**Prime contractor.** A prime contractor is a firm that performs a prime contract for an end user.

**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.

**Project.** A project refers to state 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 programs in which businesses owned by certain minority groups or women may participate but majority-owned firms typically may not. A DBE contract goal is one example of a race- and gender-conscious measure.

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



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

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

**Relevant geographic market area.** The relevant geographic market area is the geographic area in which the businesses receiving most participating entity contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to race- and gender-conscious programs requires disparity analyses to focus on the “relevant geographic market area.”

**Remedial measure.** A remedial measure, sometimes shortened to “remedy,” is a program designed to address barriers to full participation of a targeted group.

**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.

**Service-Disabled Veteran-Owned Small Business (SDVOSB).** A firm certified as a service-disabled veteran-owned small business according to the criteria of the federal Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Program.

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

**Small Business Enterprise (SBE).** A firm certified as a small business according to the size criteria of the certifying agency.

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

**Small Underutilized Business Program (SUBP).** The Small Underutilized Business Program (SUBP) ordinance is enforced by the Contract Compliance Division (CCD) of the Minneapolis Department of Civil Rights. The SUBP ordinance is intended to redress discrimination in the City’s marketplace and create opportunities for MBEs and WBEs

**State- or locally-funded contract.** A state- or locally-funded contract is any contract or project that is entirely funded with State of Minnesota, local government or other non-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 customer such as MnDOT.

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

**Subcontract goals program.** A program in which a public agency sets a percent 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.

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

**Subrecipient.** A subrecipient is a local agency receiving financial assistance passed through another agency such as MnDOT.

**Supplier.** A supplier is a firm that sells supplies to a prime contractor as part of a larger project or sells supplies directly to an end user.

**Targeted Group/Economically Disadvantaged/Veteran Owned (TG/ED/VO) Small Business Procurement Program.** The Minnesota Department of Administration operates a TG/ED/VO Small Business Procurement Program. Once certified, Targeted Group, Economically Disadvantaged and Veteran-Owned vendors are added to the State's vendor list, and are listed in the Directory of Certified Targeted Group, Economically Disadvantaged and Veteran-Owned Vendors. They receive certain price and evaluation preferences when bidding on State of Minnesota procurements. Several other state and local entities follow the TGB Program as well.

**Targeted Group Business (TGB).** To be certified as a TGB, the business must be at least 51 percent owned by a woman, racial minority or person with a substantial physical ability. The business must also be operated and controlled on a day-to-day as well as long-term basis by the qualifying owner.

**United States Environmental Protection Agency (EPA).** EPA is the federal agency that administers regulations and programs regarding environmental protection. The EPA has certain requirements regarding participation of minority- and women-owned businesses, small businesses and other targeted businesses in EPA-funded 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, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

**Utilization.** Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (for example, DBEs).

**Vendor Outreach Program (VOP).** The City of Saint Paul operates the Vendor Outreach Program (VOP), a business assistance program aimed at increasing procurement opportunities for woman-owned, minority-owned and small business enterprises (WBEs, MBEs, SBEs). Under the VOP Program, the City establishes annual goals and project-specific goals for purchasing from WBEs, MBEs and SBEs in a variety of products and service categories.

**Veteran-owned Small Business (VOSB).** The business must be at least 51 percent owned by a veteran or service-disabled veteran as determined by the Minnesota Department of Veterans Affairs. In addition, the business must be operated and controlled on a day-to-day as well as long-term basis by the qualifying owner (see definition of Service-Disabled Veteran-Owned Small Business in this appendix).

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

**Women-owned business (WBE).** A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a “WBE-certified businesses” is one certified as a woman-owned firm by a public agency.

## APPENDIX B.

### Legal Framework and Analysis

#### A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases involving local and state government minority and women-owned business enterprise (“MBE/WBE”) 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”) Program,<sup>1</sup> which DBE Program recently was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act),<sup>2</sup> and the implementation of the Federal DBE Program by local and state governments. The appendix provides a summary of the legal framework for the disparity study as applicable to: State of Minnesota; Minnesota Department of Transportation; Metropolitan Council of the Twin Cities; Minneapolis Saint Paul Metropolitan Airports Commission; Metropolitan Mosquito Control District, St. Paul, Minnesota; Minnesota State Colleges and Universities; City of St. Paul, Minnesota; City of Minneapolis, Minnesota; and Hennepin County, Minnesota (“Minnesota agencies”).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.<sup>3</sup> *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,<sup>4</sup> (“*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, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below recent Eighth Circuit Court of Appeals decisions that are instructive to the Minnesota agencies and the study, including the recent decisions in *Sherbrooke Turf, Inc. v. Minnesota DOT* and *Gross Seed v. Nebraska Department of Roads*,<sup>5</sup> and *Geyer Signal, Inc. v. Minnesota DOT*.<sup>6</sup> The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs

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<sup>1</sup> 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.

<sup>2</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>3</sup> *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

<sup>4</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>5</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT* and *Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

<sup>6</sup> *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

in other jurisdictions in Section E below, which are informative to the Minnesota agencies and the study.

In addition, the analysis reviews in Section F below recent federal cases that have considered the validity of the Federal DBE Program and its implementation by local or state government agencies and the validity of local and state DBE programs, including: *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation* (“Caltrans”), *et al.*<sup>7</sup> *Western States Paving Co. v. Washington State DOT*,<sup>8</sup> *Mountain West Holding Co. v. Montana, Montana DOT, et al.*<sup>9</sup>, *M.K. Weeden Construction v. Montana, Montana DOT, et al.*<sup>10</sup> *Dunnet Bay Construction Co. v. Illinois DOT*,<sup>11</sup> *Northern Contracting, Inc. v. Illinois DOT*,<sup>12</sup> *Adarand Construction, Inc. v. Slater*<sup>13</sup> (“Adarand VII”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>14</sup> *Geod Corporation v. New Jersey Transit Corporation*,<sup>15</sup> and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.<sup>16</sup>

The analyses of these and other recent cases summarized below are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs.

## **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.<sup>17</sup> 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.

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

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

<sup>9</sup> *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017).

<sup>10</sup> *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

<sup>11</sup> *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), *cert. denied*, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

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

<sup>13</sup> 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“Adarand VII”).

<sup>14</sup> 840 F.3d 932, 2016 WL 6543514 (7<sup>th</sup> Cir. 2016), *cert. denied*, 2017 WL 497345 (2017).

<sup>15</sup> 766 F. Supp.2d. 642 (D. N.J. 2010).

<sup>16</sup> 544 F. Supp.2d 1336 (S.D. Fla. 2008).

<sup>17</sup> 488 U.S. 469 (1989).

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."<sup>18</sup> 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.<sup>19</sup> The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.<sup>20</sup>

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.<sup>21</sup> 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."<sup>22</sup>

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."<sup>23</sup> "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."<sup>24</sup>

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<sup>18</sup> 488 U.S. at 500, 510.

<sup>19</sup> 488 U.S. at 480, 505.

<sup>20</sup> 488 U.S. at 507-510.

<sup>21</sup> 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

<sup>22</sup> 488 U.S. at 501 *quoting Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

<sup>23</sup> 488 U.S. at 502.

<sup>24</sup> *Id.*

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.”<sup>25</sup> 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.”<sup>26</sup>

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.”<sup>27</sup> “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.”<sup>28</sup>

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.”<sup>29</sup>

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

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

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

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<sup>25</sup> 488 U.S. at 509.

<sup>26</sup> *Id.*

<sup>27</sup> 488 U.S. at 509.

<sup>28</sup> *Id.*

<sup>29</sup> 488 U.S. at 492.

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

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 programs, are instructive to the disparity study because they concern challenges to the validity of MBE/WBE/DBE programs, analysis of disparity studies, the strict scrutiny analysis, and the legal framework in this area.

### 1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.<sup>30</sup> The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.<sup>31</sup>

#### 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.<sup>32</sup> State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>33</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>34</sup>

It is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>35</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and

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<sup>30</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.

<sup>31</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works P”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>34</sup> See, e.g., *Concrete Works I*, 36 F.3d at 1520.

<sup>35</sup> *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 — 76); *Western States Paving*, 407 F.3d at 992-93; *Geyer Signal, Inc.*, 2014 WL 1309092.



outside studies of statistical and anecdotal evidence (e.g., disparity studies).<sup>36</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>37</sup>
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>38</sup>
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>39</sup>
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>40</sup>
- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.<sup>41</sup> Congress also found in both the FAST

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<sup>36</sup> See, e.g., *Adarand VII*, 228 F.3d at 1167–76; see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>37</sup> *Adarand VII*, 228 F.3d at 1168-70; *Western States Paving*, 407 F.3d at 992; see *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

<sup>38</sup> *Adarand VII*, at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>39</sup> *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>40</sup> *Adarand VII*, 228 F.3d at 1174-75; see *H. B. Rowe*, 615 F.3d 233, 247-258 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4;

<sup>41</sup> 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.

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.<sup>42</sup>

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.<sup>43</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>44</sup> The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”<sup>45</sup>

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.<sup>46</sup> It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.<sup>47</sup> In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”<sup>48</sup>

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”<sup>49</sup> “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.’”<sup>50</sup> Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>51</sup>

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<sup>42</sup> *Id.* at § 1101(b)(1).

<sup>43</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Roth Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7<sup>th</sup> Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9<sup>th</sup> Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8<sup>th</sup> Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VIP”)*, 228 F.3d 1147, 1166 (10<sup>th</sup> 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 (9<sup>th</sup> Cir. 1997); *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).

<sup>44</sup> *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>45</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>46</sup> *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990; see also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7<sup>th</sup> Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>47</sup> *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 (7<sup>th</sup> Cir. 2016);

<sup>48</sup> *Croson*, 488 U.S. at 500; see e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>49</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe v. NCDOT*, 615 F.3d 233 (4<sup>th</sup> Cir. 2010); *Geyer Signal, Inc.*, 2014 WL 1309092 (D. Minn. 2014); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10<sup>th</sup> Cir. 1994).

<sup>50</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7, *quoting Concrete Works*, 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509); see also, *Sherbrooke Turf*, 345 F.3d at 973; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010).

<sup>51</sup> *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at \*7, *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010).

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>52</sup> Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>53</sup> Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.<sup>54</sup>

To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence.<sup>55</sup> 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.<sup>56</sup> Conjecture and unsupported criticisms of the government’s methodology are insufficient.<sup>57</sup> The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.<sup>58</sup>

In *Geyer Signal, Inc. v. Minnesota DOT*, the district court in Minnesota 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.’”<sup>59</sup> The court pointed out in rejecting the plaintiff’s disagreement with the use and interpretation of various statistical methods, that rebuttal requires presentation of affirmative evidence upon which the court could conclude that no discrimination exists in Minnesota’s public contracting.<sup>60</sup> The court also found 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.”<sup>61</sup>

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<sup>52</sup> *Adarand Constructors, Inc. v. Peña*, (“*Adarand IIP*”), 515 U.S. 200 at 235 (1995); *See, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820.

<sup>53</sup> *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 (7<sup>th</sup> Cir. 2016); *Midwest Fence*, 2015 WL 1396376 \*7; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>54</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166.

<sup>55</sup> *See e.g., H.B. Rowe v. North Carolina DOT* (4<sup>th</sup> 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 (10<sup>th</sup> Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at \*7, *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>56</sup> *Id. See e.g., Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3<sup>d</sup> Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9<sup>th</sup> Cir. 1991).

<sup>57</sup> *Id. see also, Midwest Fence*, 840 F.3d 932, 952-954 (7<sup>th</sup> Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>58</sup> *Midwest Fence*, 840 F.3d 932, 952-954 (7<sup>th</sup> 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; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>59</sup> *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

<sup>60</sup> *Id.*

<sup>61</sup> *Id. quoting Advanced Constructors, Inc.*, 228 F.3d at 1166.

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.”<sup>62</sup> It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest).<sup>66</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>67</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>68</sup> The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>69</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>70</sup>

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<sup>62</sup> *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)).

<sup>63</sup> *H.B. Rowe Co.*, 615 F.3d at 241; see e.g., *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958.

<sup>64</sup> *Croson*, 488 U.S. 509, see e.g., *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241.

<sup>65</sup> *H.B. Rowe*, 615 F.3d at 241, 1 *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see e.g., *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Kossman Contracting Co, Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>66</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>67</sup> *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, 953; *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).

<sup>68</sup> *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 948-953 (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); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* (“*Concrete Works II*”), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>69</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 949-952; *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; see, also, *Western States Paving*, 407 F.3d at 1001; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>70</sup> *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.<sup>71</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>72</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>73</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>74</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>75</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>76</sup>
- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>77</sup>

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<sup>71</sup> See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rotbe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995. See, also *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).

<sup>72</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting, *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *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).

<sup>73</sup> *Id.*

<sup>74</sup> See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

<sup>75</sup> 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 Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

<sup>76</sup> 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; *Rotbe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>77</sup> 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.

**Anecdotal evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>78</sup> But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>79</sup> It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative.<sup>80</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>81</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>82</sup>

#### b. The Narrow Tailoring Requirement.

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

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<sup>78</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>79</sup> 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).

<sup>80</sup> *Concrete Works I*, 36 F.3d at 1520.

<sup>81</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

<sup>82</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.<sup>83</sup>

The Eighth Circuit in *Sherbrooke Turf* specified the following elements of narrow tailoring as follows: “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”.<sup>84</sup>

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 local and state 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.<sup>85</sup>

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.’”<sup>86</sup>

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<sup>83</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *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; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); see, also, *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>84</sup> *Sherbrooke Turf*, 345 F.3d at 971.

<sup>85</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; see, also, *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245, 252-254; *Kornbass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>87</sup> Courts, including the Eighth 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.”<sup>88</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, ‘for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>89</sup>

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>90</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans — many of which would not have used express racial classifications — were rejected with little or no consideration.”<sup>91</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

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

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

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>92</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of

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<sup>86</sup> *Sherbrooke Turf, Inc.*, 345 F.3d at 972, quoting *Adarand Constrs., Inc.*, 515 U.S. at 237-38.

<sup>87</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

<sup>88</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

<sup>89</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

<sup>90</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

<sup>91</sup> 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).

<sup>92</sup> 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; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.



race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>93</sup>

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>94</sup>

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>95</sup>

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<sup>93</sup> See *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268.

<sup>94</sup> *Croson*, 488 U.S. at 509-510.

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>96</sup>

**Additional factors considered under narrow tailoring.** In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>97</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>98</sup> (2) good faith efforts provisions;<sup>99</sup> (3) waiver provisions;<sup>100</sup> (4) a rational basis for goals;<sup>101</sup> (5) graduation provisions;<sup>102</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>103</sup> (7) sunset provisions;<sup>104</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>105</sup>

As cited and discussed above, the significant recent case in this area regarding MBE/WBE/DBE programs in the Eighth Circuit is the decision in *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,<sup>106</sup> which is summarized in Section D below. It is instructive to review the Eighth Circuit analysis in *Sherbrooke Turf*, including its findings, related to the Federal DBE Program and its implementation by the Minnesota DOT.

The Eighth Circuit noted “the revised DBE program has substantial flexibility. A State may obtain waivers or exemptions from any requirement and is not penalized for a good faith failure to meet its overall goal.”<sup>107</sup> In addition, the Eighth Circuit pointed out the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000 cannot qualify as economically disadvantaged.<sup>108</sup> The Eighth Circuit also mentioned the

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<sup>95</sup> See e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; 49 CFR § 26.51(b).

<sup>96</sup> *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 (4<sup>th</sup> 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.

<sup>97</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>98</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> 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 (9<sup>th</sup> Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9<sup>th</sup> Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11<sup>th</sup> Cir. 1990).

<sup>99</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>100</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7<sup>th</sup> Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *CAEP I*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

<sup>101</sup> *Id.*, *Sherbrooke Turf*, 345 F.3d at 971-973.

<sup>102</sup> *Id.*

<sup>103</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 998; ; *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964 (8<sup>th</sup> Cir 2003); *AGC of Ca.*, 950 F.2d at 1417.

<sup>104</sup> *Sherbrooke Turf*, 345 F.3d at 971-972; See, e.g., *H. B. Rowe*, 615 F.3d 233, 252-255 (4<sup>th</sup> Cir. 2010); *Peightal*, 26 F.3d at 1559.

<sup>105</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>106</sup> 345 F.3d 964 (8<sup>th</sup> Cir 2003).

<sup>107</sup> *Sherbrooke Turf, Inc.*, 345 F. 3d at 972.

<sup>108</sup> *Id.* at 972, *citing*, 49 C.F.R. § 26.67(b).

limits in the DBE program, stating that “the DBE program contains built-in durational limits,” in that a “State may terminate its DBE program if it meets its annual overall goal through race- neutral means for two consecutive years.”<sup>109</sup>

The Eighth Circuit also found durational limits based on the fact “TEA-21 is subject to periodic congressional reauthorization. Periodic legislative debate assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”<sup>110</sup> The Eighth Circuit noted courts have found other measures for limiting program duration: such as required termination if goals have been met,<sup>111</sup> decertification of MBEs who achieve certain levels of success, or mandatory review of MBE certification at regular, relatively brief periods.

The Eighth Circuit approved the goal-setting process for the Federal DBE Program.<sup>112</sup> The Federal DBE regulations require that goals be based on one of several methods for measuring DBE availability.<sup>113</sup> The Eighth Circuit found that the “DOT has tied the goals for DBE participation to the relevant labor markets,” insofar as the “regulations require grantee States to set overall goals based upon the likely number of minority contractors that would have received federally assisted highway contracts but for the effects of past discrimination.”<sup>114</sup>

The Eighth Circuit stated that goal setting may be inexact, but the process requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets.<sup>115</sup> The Eighth Circuit noted the DBE regulations use built-in mechanisms to ensure that DBE goals are not set excessively high relative to DBE availability, including that DBE contract goals are not to be used if the overall goal has been met for two consecutive years by race- neutral means, and must be reduced if overall goals have been exceeded with race-conscious means for two consecutive years.<sup>116</sup> The Eighth Circuit held these provisions to be narrowly tailored, noting they were implemented in Minnesota and Nebraska based in part on local disparity studies that provide a basis to calculate the applicable goals.<sup>117</sup>

It also is instructive to point out the court’s rejection in *Geyer Signal, Inc. v. Minnesota DOT* of the challenges to the aspirational goals MnDOT set for DBE performance.<sup>118</sup> The court found insufficient challenges raised by the plaintiffs based on the fact 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.<sup>119</sup> Because these challenges identified only a different

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<sup>109</sup> *Id.* at 972, *citing*, 49 C.F.R. § 26.51(f)(3).

<sup>110</sup> *Id.*, *quoting*, *Grutter*, 123 S. Ct. at 2346.

<sup>111</sup> *Sherbrooke Turf, Inc.*, 345 F.3d at 972.

<sup>112</sup> *Sherbrooke Turf, Inc.*, 345 F.3d at 971-973; *see W. States Paving Co.*, 407 F.3d at 994-995; *Adarand Constrs. Inc.*, 228 F.3d at 1181-1182.

<sup>113</sup> 49 C.F.R., § 26.45 (2006).

<sup>114</sup> *Sherbrooke Turf, Inc.*, at 972, 345 F. 3d *citing*, 49 C.F. R. § 26.45(c)-(d) (Steps 1 and 2); *see also*, *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>115</sup> *Id.* at 972, *quoting*, *Croson*, 488 U.S. at 507.

<sup>116</sup> *Id.* at 972.

<sup>117</sup> *Id.* at 973-974.

<sup>118</sup> 2014 WL 1309092.

<sup>119</sup> *Id.*

interpretation of the data and did not establish that MnDOT was unreasonable in relying on the outcome of disparity studies, the court held plaintiffs failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting.<sup>120</sup>

The Eighth Circuit found that narrow tailoring also requires minimizing the burden of the MBE/WBE/DBE program on third parties. The Eighth Circuit noted Congress and U.S. DOT have taken steps to minimize the race based nature of the DBE program by directing its benefits at small businesses owned and controlled by the socially and economically disadvantaged.<sup>121</sup>

## 2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.<sup>122</sup> The district court in *Geyer Signal, Inc. v. Minnesota DOT* recognized the intermediate scrutiny standard, stating that because the Federal DBE Program contains a gender conscious provision, it is a classification that would be subject to intermediate scrutiny.<sup>123</sup>

The courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.<sup>124</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>125</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Sherbrooke Turf, Inc.* 345 F.3d at 972-73, citing *Grutter*, 123 S. Ct. at 2345-46; *Gratz v. Bollinger*, 123 S. Ct. 2411, 2429 (2003)

<sup>122</sup> See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9<sup>th</sup> Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> 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 (11<sup>th</sup> Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>123</sup> 2014 W.L. 1309092 at footnote 4, citations omitted.

<sup>124</sup> *Id.*; See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9<sup>th</sup> Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> 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 (11<sup>th</sup> Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

<sup>125</sup> *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 (7<sup>th</sup> Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.<sup>126</sup> The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>127</sup>

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.”<sup>128</sup>

### 3. Rational basis scrutiny analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.<sup>129</sup> 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.”<sup>130</sup> It should be noted, however, the Minnesota Supreme Court has, at least in some circumstances, applied what it called a “higher standard” when applying rational basis review under the Minnesota Constitution.<sup>131</sup> The Minnesota rational basis test has three requirements:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.<sup>132</sup>

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<sup>126</sup> See generally, *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.”)

<sup>127</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng’g Contractors Ass’n*, 122 F.3d at 910.

<sup>128</sup> 122 F.3d at 929 (internal citations omitted.)

<sup>129</sup> *Gluba ex rel. Gluba v. Bitzan & Obren Masonry*, 735 N.W.2d 713, 719 (Minn. 2007); 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.”)

<sup>130</sup> *Kolton v. Cnty. of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002).

<sup>131</sup> *Scott v. Minneapolis Police Relief Ass’n*, 615 N.W.2d 66, 74 (Minn. 2000) (noting that one test is the test articulated by federal courts and the other is “often characterized as the Minnesota rational basis test”).

<sup>132</sup> *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (quoting *Wegan v. Vill. of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981).

The Minnesota Supreme Court has stated: “The key distinction between the federal and Minnesota tests is that under the Minnesota test ‘we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.’”<sup>133</sup> The Minnesota intermediate appellate court has previously held, and the Minnesota Supreme Court affirmed, that Minnesota’s rational-basis test “applies when analyzing any case under the equal protection clause of the Minnesota Constitution.”<sup>134</sup>

More recently in *Gluba*, the Minnesota Supreme Court “declined to infer from the language or structure of the Minnesota rational-basis test that a higher standard than the federal standard applies to matters concerning the regulation of economic activity and the distribution of economic benefits.”<sup>135</sup> In *Gluba*, the Minnesota Supreme Court, in determining whether a challenged provision in the Minnesota Workers’ Compensation Act violated the Equal Protection Clause of the Minnesota Constitution, “concluded that the analysis of the challenged provision under the second step of the Minnesota rational-basis test would focus on whether the legislature could reasonably have believed in any facts that would support the connection between the statutory classification and the purpose of the statute.”<sup>136</sup>

Thus, there is authority that when applying rational basis review to matters concerning the regulation of economic activity, the Minnesota Supreme Court may apply the federal standard of review. 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.”<sup>137</sup>

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”).<sup>138</sup>

*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;

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<sup>133</sup> *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quoting *Russell*, 477 N.W.2d at 889).

<sup>134</sup> *Mitchell v. Steffen*, 487 N.W.2d 896, 904 n.2 (Minn. App. 1992), *aff’d*, 504 N.W.2d 198 (Minn. 1993).

<sup>135</sup> *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 450 (Minn. App. 2012) (citing *Gluba*, 735 N.W.2d at 723).

<sup>136</sup> *Id.*

<sup>137</sup> *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *see also Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

<sup>138</sup> 2012 WL 5939228 (Fed. Cl. 2012).

Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”<sup>139</sup>

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.<sup>140</sup> The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”<sup>141</sup>

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.<sup>142</sup> 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 . . . .”<sup>143</sup>

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

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to the study, include:

- *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9<sup>th</sup> 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 found at 2014 WL 6686734 (D. Mont. Nov. 26, 2014) (See Section F below).
- *Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7<sup>th</sup> Cir. 2016). *Petition for a Writ of Certiorari filed with the U.S. Supreme Court*, 2017 WL 511931 (Feb. 2, 2017), *cert. denied*, 2017 WL 497345 (June 26, 2017). (See Section F below).
- *Rothe Development Inc. v. United States Department of Defense, United States Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), *affirming on other grounds, Rothe Development, Inc. v. United States Department of Defense, U.S. Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C., 2015). *Petition for Rehearing En Banc*, filed on October 19, 2016, in the U.S. Court of Appeals, District of Columbia Circuit, was denied on January 13, 2017. *Petition for a Writ of Certiorari filed*

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

with the U.S. Supreme Court, April 13, 2017, Docket No. 16-1239. The Petition was denied on October 16, 2017. 2017 WL 1375832. (See Section G below).

It is instructive to note the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*,<sup>144</sup> which was affirmed on other grounds, by the United States Court of Appeals, District of Columbia Circuit,<sup>145</sup> on September 9, 2016.<sup>146</sup>

Plaintiff *Rothe Development, Inc.* filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) challenging the constitutionality of the Section 8(a) Program on its face. The Constitutional challenge is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*.<sup>147</sup> *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional.

Plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic*, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face. The district court in *Rothe* agreed with the court’s findings, holdings and reasoning in *DynaLantic*, and thus concluded that Section 8(a) is constitutional on its face.

The district court held that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government satisfied strict scrutiny and demonstrated a compelling interest for the racial classification, the need for remedial action is supported by strong and un rebutted evidence, and the Section 8(a) program is narrowly tailored.

*Rothe* appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal has just been decided as of the writing of this report. The Court of Appeals in *Rothe*<sup>148</sup> affirmed the district court’s decision but on other grounds.

The Court of Appeals in *Rothe* found that the challenge was only to the Section 8(a) statute, not the implementing regulations, and thus held the Section 8(a) statute was race-neutral.<sup>149</sup> Therefore, the Court of Appeals held the rational basis test applied and not strict scrutiny.<sup>150</sup> The court affirmed the grant of summary judgment to the government defendants applying the rational basis standard, and upheld the validity of Section 8(a) based on the limited challenge by Plaintiff *Rothe* to the statute and not the regulations.

The Court of Appeals held that Section 8(a) of the Small Business Act does not warrant strict scrutiny because it does not on its face classify individuals by race.<sup>151</sup> Section 8(a), the Court said, unlike the implementing regulations, uses facially race-neutral terms of eligibility to identify individual

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<sup>144</sup> 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015).

<sup>145</sup> 2016 WL 4719049.

<sup>146</sup> *Id.*

<sup>147</sup> 885 F.Supp.2d 237 (D.D.C. 2012)

<sup>148</sup> 2016 WL 4719049 (September 9, 2016)

<sup>149</sup> 2016 WL4719049, at \*1-2.

<sup>150</sup> *Id.*

<sup>151</sup> 2016 WL 4719049 at \*\*1-2.



victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such.<sup>152</sup> See Section G below.

Rothe filed a Petition for a Writ of Certiorari to the U.S. Supreme Court, which was denied on October 16, 2017. 2017 WL 1375832.

This list of pending cases is not exhaustive, but is illustrative of current pending cases that involve challenges to MBE/WBE/DBE programs.

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

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

### **1. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1041 (2004)**

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 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

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<sup>152</sup> *Id.*

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*).

**2. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)**

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

**Analysis and Order of the Court.** The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

**Plaintiff’s claims.** The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff’s claims of discrimination because the plaintiffs did not establish by evidence that the City “intentionally” rejected their bid due to race or that the City “intentionally” discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a “discriminatory motive.” *Id.* at 968. The court concluded that plaintiffs had failed to show that the City’s actions were “racially motivated.” *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

### **3. *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 assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

**Congressional evidence of discrimination: disparity studies and barriers.** Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at \*13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* \*14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* \*14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at \*14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at \*6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* \*6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at \*5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at \*14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against

minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at \*14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at \*14, quoting *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at \*14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at \*14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at \*14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at \*15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at \*15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at \*15.

**Narrowly tailored.** The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at \*15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to

demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

**Overconcentration.** Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at \*15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at \*16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at \*16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at \*16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into “group-specific goals”, but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at \*16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at \*16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient’s ability to tailor specific contract goals to combat overconcentration. *Id.* at \*16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at \*17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at \*17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs’ facial challenge to the Program fails, and granted the Federal Defendants’ motion for summary judgment. *Id.*

**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 *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at \*18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at \*18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at \*18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at \*18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at \*18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at \*18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at \*18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at \*18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**Alleged inappropriate goal setting.** 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.

**4. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), *aff'd* 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part, by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.). The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson*’s strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at \*11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at \*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 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.*

**5. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), *aff'd* 345 F.3d 964 (8<sup>th</sup> Cir. 2003)**

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 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.

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

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

**1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4<sup>th</sup> Cir. 2010)**

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



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

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against equal-protection challenges.” *Id.*, at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 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 *Cmson*, 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 (8<sup>th</sup> Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rotbe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors — nearly 38 percent — “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

**Anecdotal evidence.** The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

**Strong basis in evidence that the minority participation goals were necessary to remedy discrimination.** The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

**Narrowly tailored.** The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

**Neutral measures.** The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave



serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

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

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

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

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

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

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

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

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

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

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

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

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

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

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

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

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

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

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis “allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program.” *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

### **3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7<sup>th</sup> Cir. 2006)**

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

**4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> Cir. 2005) (unpublished opinion)**

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11<sup>th</sup> Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that [m]inorities ha[d] not participated in school board purchases and

contracting in a ratio reflecting the minority make-up of the community.” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

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

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

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

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

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

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

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003),

and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5<sup>th</sup> Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Viridi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Viridi to lose a contract that he would have otherwise received. *Id.* Thus, because Viridi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

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

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

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

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

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

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

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



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

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

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

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

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

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the

disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

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

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

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

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

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the

same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

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

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

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

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

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

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

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

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

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

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

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

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

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

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

The Court's rejection of CWC's arguments and the district court findings.

**Use of marketplace data.** The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

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

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

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

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public

construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

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

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

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

**Summary.** The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, *quoting Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, *quoting Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own

marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

**Narrow tailoring.** Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson*'s strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

### **7. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)**

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was overinclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action . . .” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part* *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11<sup>th</sup> Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645

quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case — “that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

**8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)**

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

**Statistical evidence: compelling interest.** The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. “If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.” *Id.* at 736.

The Court stated the only cases found to present the necessary “compelling interest” sufficient to justify a narrowly tailored race-based remedy, are those that expose “pervasive, systematic, and obstinate discriminatory conduct. . . .” *Id.* at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

**Narrow tailoring.** A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting . . . .” *Id.* at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from “overinclusiveness.” *Id.* at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10 percent of state contracts, while African Americans receive none. *Id.*

In addition, the Court found that Ohio’s own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state’s 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.



Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

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

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

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

## 10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9<sup>th</sup> Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9<sup>th</sup> Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

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

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

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas . . . [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10<sup>th</sup> Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996). The court held that the statute violated the Equal Protection Clause.

### **11. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11<sup>th</sup> Cir. 1997)**

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

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11<sup>th</sup> Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to

demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve. *Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

*“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.” Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

**The statistical evidence.** The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

**County contracting statistics.** The County presented a study comparing three factors for County non-procurement Construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

*“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”* *Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general . . . disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 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 (10<sup>th</sup> Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

*“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”* *Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination . . . [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

*The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. Id.*

The Eleventh Circuit then summarized:

*Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (i.e., most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

*Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. Id.* The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*



**Marketplace data statistics.** The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

**The Wainwright Study.** The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

**Anecdotal evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than

their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

*Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. *Id.* at 924-25.*

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit *flatly reject[ed]* the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. *Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

*[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Id., quoting Croson, 488 U.S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. Id. at 928. "Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." Id.*

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

**Substantial relationship.** The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

## **12. 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 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating

the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

### **13. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)**

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.



The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before

adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing *Croson*, 488 U.S. at 507. The second characteristic of the narrowly tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 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**

#### **14. *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 non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the 4 percent

substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

**15. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)**

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* ("Rowe"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4<sup>th</sup> Cir. 2010), discussed above.

**16. *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.

**17. *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 (10<sup>th</sup> Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

- (1) data identification and collection of methodology for displaying the research results;
- (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an

assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

*Id.* The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by 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 (10<sup>th</sup> Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process

it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law

was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

#### **18. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)**

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and

the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’” *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

**19. *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).



**20. *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.

**21. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)**

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10<sup>th</sup> Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

**Compelling state interest.** The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, *citing to Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6<sup>th</sup> Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenor 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 Intervenor did not actually offer any of the evidence to the court in this case. The Intervenor 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 Intervenor 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 Intervenor’s evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenor did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 — 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

**Narrow tailoring.** The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified

minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of

minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under and overinclusiveness” 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 overinclusiveness 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.

**22. *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.

**23. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ff'd per curiam 218 F.3d 1267 (11th Cir. 2000)**

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

*Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period. Id.* The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence.



*Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity .... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11<sup>th</sup> Cir. 2000).

#### **24. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

**Strict Scrutiny.** The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

1. Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.
2. A program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id.*

3. The state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” *Id.* at 745.
4. The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*
5. The state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*
6. The evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

**Narrow Tailoring.** The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Cmsn*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE

submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

**Conclusion.** The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

## **25. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)**

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that

the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT’s claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities “supposedly willing and able to do road maintenance work,” and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in “somebody’s” discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

## **F. Recent Decisions Involving the Federal DBE Program and its Implementation 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. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.

**2. *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 (7<sup>th</sup> 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 overinclusive. *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.

**Overinclusive argument.** Midwest Fence also argued that the federal program is overinclusive 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).

**3. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7<sup>th</sup> 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. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at \*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 non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.*

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at \*13. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because

of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at \*14. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 28.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at \*15. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.*

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at \*15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at \*16. The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at \*17. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.* at \*17.



In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at \*17. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at \*17-18.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at \*18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at \*19, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at \*19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 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.

**4. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9<sup>th</sup> Cir. 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 t<sup>l</sup> groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

*"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination."* *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

**Evidence gathering and the 2007 Disparity Study.** On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts." *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

**Caltrans’ DBE Program.** Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans’ DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans’ DBE program until in 2009, the DOT approved Caltrans’ DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

**Subsequent Caltrans study and program.** While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

**Jurisdiction issue.** Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

**Caltrans' DBE Program held constitutional on the merits.** The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

**Application of strict scrutiny standard articulated in *Western States Paving*.** The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

**Evidence of discrimination in California contracting industry.** The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer — or have ever suffered — discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at \*9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans’ decision to include all women in its DBE program. *Id.* at 1195.

**Program tailored to groups who actually suffered discrimination.** The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state’s contracting industry. *Id.* at 1198. The Court found Caltrans’ DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans’ program “adheres precisely to the narrow tailoring requirements of *Western States*.” *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.” *Id.*



**Consideration of race-neutral alternatives.** The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

**Certification affidavits for Disadvantaged Business Enterprises.** The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

**Application of program to mixed state- and federally-funded contracts.** The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

### **5. *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 (9<sup>th</sup> Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186.* Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186.* The Court stated that there was

nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id.* at 1186.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id.* at 1187.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

**6. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)**

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7<sup>th</sup> Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States*

*Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, citing *Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7<sup>th</sup> Cir. 1991), then reaffirmed in *Northern Contracting*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations

through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6<sup>th</sup> Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10<sup>th</sup> Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

#### **7. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007)**

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7<sup>th</sup> Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure 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 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government .... If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7<sup>th</sup> Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that

the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (citing 49 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 (9<sup>th</sup> Cir. 2005), cert. denied, 546 U.S. 1170 (2006)**

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21<sup>st</sup> Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id.* (citing regulation).



A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

**Facial challenge (Federal Government).** The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

**As-applied challenge (State of Washington).** Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s

facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6<sup>th</sup> Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9<sup>th</sup> Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 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. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)**

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

*[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several*

*race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.*

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

### **Recent District Court Decisions**

**10. *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 (7<sup>th</sup> Cir. 2016).**

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

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to

replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at \*15. The industries and counties in which IDOT 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.

**11. *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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at \*26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at \*26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*." *Id.* at \*26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at \*27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at \*27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at \*27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at \*28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 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.

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana

Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that it was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if it were a non-DBE subcontractor. *Id.*

**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, “the Ninth Circuit held that California’s DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California — and, by extension, Montana — “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

**13. *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 (9<sup>th</sup> 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.*

**14. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)**

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

**New Jersey Transit Program and Disparity Study.** NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id.* at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at

649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7<sup>th</sup> Cir. 2007).

**Applying Northern Contracting v. Illinois.** The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6<sup>th</sup> Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8<sup>th</sup> Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 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.

**15. *Geod Corporation v. New Jersey Transit Corporation, et. seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)**

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5<sup>th</sup> and 14<sup>th</sup> Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 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 overinclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at \*4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive

justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at \*5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at \*5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at \*5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at \*6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at \*6, citing 49 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.

**16. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *aff’d* 473 F.3d 715 (7<sup>th</sup> Cir. 2007)**

This decision is the district court’s order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments’ implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at \*1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at \*4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at \*7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at \*8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling

for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and

5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

*Id.* (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at \*15.

**Strict scrutiny.** The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program . . . If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at \*16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at \*17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at \*18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at \*19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at \*21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at \*21, n. 32.

The court further found:

*That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’* *Id.* at \*21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “‘plausible lower-bound estimate’ of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway

contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

*Id.* at \*23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7<sup>th</sup> Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at \*23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at \*24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10<sup>th</sup> Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

**17. *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 (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision,

*supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. § 2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's § 2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the § 2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

**18. *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 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at \*34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 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/offeree 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 overinclusive 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.

#### **19. *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.

### **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 a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* \*3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* \*3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* \*4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* \*4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* \*5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* \*6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* \*8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at \*7.

**The SBA statute does not trigger strict scrutiny.** The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* \*10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* \*9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* \*10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* \*10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances

qualifies as compelling. *Id* \*11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

**Other issues.** The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* \*11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* \*12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* \*13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* \*16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* \*22.

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

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-

socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004)). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

**2007 Order of the District Court (499 F.Supp.2d 775).** In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female.

Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator

Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, *quoting* 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at



875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 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 overinclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest — strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark

Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson*’s emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson*’s evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

**Before Congress.** The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5<sup>th</sup> Cir. 2006).

**Methodology.** The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11<sup>th</sup> Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

**Geographic coverage.** The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545

F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

**Anecdotal evidence.** The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, citing *Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

**Narrowly tailoring.** The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

**3. *Rothe Development, Inc. v. U.S. 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 non-minority counterparts. *Id.* at \*5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at \*5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional

services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

**Defendants' expert evidence.** One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at \*9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at \*10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*



The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at \*11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at \*12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at \*13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at \*14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at \*15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at \*17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at \*17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action — specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at \*17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at \*17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at \*18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 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 (10<sup>th</sup> Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at \*10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at \*11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at \*11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at \*11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9<sup>th</sup> Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at \*11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10<sup>th</sup> Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at \*11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at \*11, citing *Concrete Works IV*, 321 F.3d at 958.

**Evidence before Congress.** The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at \*16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at \*17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10<sup>th</sup> Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of

barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at \*17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at \*17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at \*21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

**State and local disparity studies.** Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at \*25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at \*26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at \*26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at \*26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at \*26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at \*26, n. 10.

**Analysis: Strong basis in evidence.** Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at \*29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is

unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at \*29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at \*31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at \*31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at \*31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at \*31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at \*31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at \*31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at \*32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at \*32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at \*34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at \*35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing

*Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic*, at \*35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at \*35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at \*35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at \*35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at \*35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at \*36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at \*36.

**Facial challenge: Conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at \*37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at \*37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic*, at \*38. The federal Defendants also admit that they are "unaware of



any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at \*38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at \*38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at \*38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at \*38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at \*39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at \*40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at \*40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at \*40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at \*40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O’Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at \*40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at \*40. According to the Court, it need not take a party’s definition of “industry” at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff’s industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at \*40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at \*41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at \*41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at \*42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at \*43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at \*44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at \*44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 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 non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and *DynaLantic*: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

##### **5. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)**

*DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal.

Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

## **APPENDIX C.**

### **Minnesota Department of Administration Utilization Data Collection**

Keen Independent compiled data about Minnesota Department of Administration (Admin) procurements as well as the firms used as subcontractors on Admin construction contracts. The utilization analysis focused on construction, professional services, goods and other services contracts during the July 1, 2011 through June 30, 2016 study period. Data separately collected for MnDOT highway construction and engineering contracts are not discussed here.

Appendix C describes the study team's utilization data collection processes in four parts:

- A. Construction, professional services, goods and other services payment data;
- B. Characteristics of utilized firms;
- C. Department of Administration review; and
- D. Data limitations.

#### **A. Construction, Professional Services, Goods and Other Services Payment Data**

The Department of Administration makes purchases for 88 business units in state government, including goods and some services for the Minnesota Department of Transportation.

**Data received.** Keen Independent obtained information about construction, professional services, goods and other services through two sources:

- 1. Payments data maintained in the StateWide Integrated Financial Tools online system (SWIFT); and
- 2. Department of Revenue IC134 Contractor Affidavits (IC134).

Note that the use of the term “contracts” throughout Appendix C refers to any type of procurement through any procurement method.

**1. Non-construction contracts.** The payment database included business unit identifiers and purchase order numbers. Keen Independent created a unique procurement identifier combining business unit, purchase order and vendor number. Keen Independent summed the payments for each business unit for each purchase order and vendor. Keen Independent examined information for payments made within the study period (July 1, 2011 through June 30, 2016).

Fields in the SWIFT data include:

- Business unit;
- Voucher id;
- Voucher line number;
- Account;
- Merchandise amount (total payments);
- Business unit PO;
- PO ID;
- Charge date PO;
- Line number;
- Schedule number;
- PO distribution line number;
- Fund code (funding source);
- Vendor ID;
- Vendor location;
- Vendor name;
- Contract ID (for some records);
- Contract description;
- Contract begin date;
- Contract description;
- Ship to ID (location);
- Contract amount;
- Purchase order category;
- Purchase order description - United Nations Standard Products and Services Code; and
- Vendor type (government, non-profit, foreign, business).

**2. Construction contracts and subcontracts.** Keen Independent obtained construction prime and subcontractor information through IC134 Contractor Affidavits.

IC134 data are an effective tool to obtain prime and subcontractor information because the affidavit is certified by the Department of Revenue before the State of Minnesota can make final payments to prime contractors. Furthermore, subcontractors submit their own IC134 affidavits before the prime contractor can submit its own IC134 Form, encouraging the full disclosure of information.

Fields in the IC134 Affidavit include:

- Company name;
- Company address, city, state and zip code;
- Project Number;
- Project Location;
- Total Contract Amount;
- Hiring entity;
- Month/year work began;
- Month/year work ended; and
- Hiring business.

**Exclusions.** The study team made certain exclusions to the payment data received.

**Minnesota Department of Transportation.** As Keen Independent separately examined highway construction and engineering contracts for the Minnesota Department of Transportation, those contracts were excluded from data received from Admin. This included purchases from the following funds:

- 2500 Municipal State Aid Street;
- 2700 Trunk Highway;
- 2710 Highway users tax distribution;
- 3510 Trunk highway bond fund; and
- 3520 Transportation — bridge and road.

Also, purchases with UNSPSC codes related to highway, road and bridge work were excluded from analysis:

- 72141000 — Highway and road construction services;
- 70111707 — Highway lawn maintenance services;
- 72141103 — Highway and road paving service;
- 72141104 — Highway and road resurfacing service;
- 72141107 — Bridge construction and repair service;
- 72151305 — Bridge painting service;
- 81101510 — Highway engineering; and
- 81101511 — Railway engineering.

Exclusions of payments to non-businesses, for real property purchase or lease, and for certain types of work. The study team also excluded payments related to:

- Government;
- Not-for-profits;
- Utilities;
- Phone services;
- Banks;
- Educational institutions;
- Insurance companies;
- Products related to national markets (software, for example), and
- Physician, hospital and related services.

**Exclusion of very small purchases.** Also, the study team examined procurements that totaled more than \$2,000 in payments. This accounted for 98 percent of the total payments during the study period (before exclusions).

**Other exclusions.** Payments made before the study period were excluded from analysis.

**Total number of procurements and dollars.** Admin prepared a database for the study team that included about 3.3 million individual payment records over the study period. Keen Independent's consolidation of these procurement data shows 76,010 procurements totaling \$3.1 billion from July 2011 through June 2016.

**Coding of work types for prime contracts.** Keen Independent coded the type of work involved in each Admin procurement using 80+ categories of construction, professional services, goods and other services work developed for the disparity study.

Admin uses the United Nations Standard Products and Services Code (UNSPSC) system to record the type of construction, services or goods provided in each procurement. Keen Independent translated those UNSPSC codes into 8-digit subindustry codes developed by Dun & Bradstreet, which is based on the Standard Industrial Classification (SIC) system. The study team used the D&B 8-digit codes when determining types of work for each of the entities participating in the Joint Disparity Study.

Keen Independent individually researched the type of work performed in a procurement for each large contract, when the UNSPSC code was not sufficiently detailed or when State coding for a procurement appeared to be inaccurate.

For IC134 prime contractors and subcontractors, the study team used the primary SIC code of the firm (e.g., "painting") to record the type of work performed since IC134 data do not include a description of the work involved in a prime contract or subcontracts.



## B. Characteristics of Utilized Firms

Keen Independent examined firm location and attempted to collect other business characteristics including the race, ethnicity and gender of the business owner.

**Firm location.** The study team analyzed the location of firms receiving Admin work based on vendor address data provided in SWIFT.

Sometimes SWIFT only had a headquarters or billing address and not the address for its Minnesota location. This was a particular issue for goods purchases. For goods suppliers receiving a large amount of procurement dollars that initially appeared to be out-of-state, Keen Independent further researched whether the business had a physical presence within Minnesota. (This step was not needed for other industries, as most firms had a Minnesota location in the SWIFT data.)

**Firm ownership and certification status.** The Department of Administration provided TG/ED/VO status, contact information and other data for its vendors from SWIFT.

Collecting data on the race, ethnicity and gender ownership of utilized firms is key to building the database on firm characteristics. Sources of information to determine whether firms are owned by minorities or women (including race/ethnicity) and whether firms are certified included:

- Study team telephone interviews with firm owners and managers;
- Availability survey with firm owners and managers;
- Department of Administration, City of Saint Paul, Minnesota Department of Transportation, and Minnesota State interested vendors lists;
- City of Minneapolis vendors' lists;
- Hennepin County and City of Saint Paul contract lists;
- Minnesota Unified Certification Program (UCP) database;
- Central Certification (CERT) program database;
- Targeted Group, Economically Disadvantaged and Veteran-Owned Program database;
- Information from Dun & Bradstreet; and
- Review by staff of participating entities and members of the External Stakeholder Group for this project.

## C. Department of Administration Review

Minnesota Department of Administration staff reviewed Keen Independent utilization data at several stages of the study. The study team met with Admin staff multiple times to review the data collection process, information that the study team gathered, and summary results. Admin staff also reviewed payment and vendor information. Keen Independent incorporated Admin feedback throughout the study process.

## **D. Data Limitations**

Limitations concerning contract data collection include the following:

- The Department of Administration does not track subcontract data. Keen Independent compiled prime and subcontract information from IC134 forms (withholding affidavit for contractors) that prime contractors and subcontractors filed with the State.
- Keen Independent coded work types for procurements based on Admin information available for those purchases. The study team work type coding may not perfectly describe the actual work performed in the procurement.
- There were some firms for which no ownership information was available, even after multiple attempts to research the company. Keen Independent coded those firms as “majority-owned.”
- Even though the study team took steps to minimize the possibility of double counting Admin and Department of Transportation contracts, there might be some duplicate contracts in the both the Admin and the Department of Transportation data.

It does not appear that any of these data limitations would materially affect overall utilization and availability results.

## **APPENDIX D.**

### **General Approach to Availability Analysis**

The study team used an approach similar to a “custom census” to compile data on minority-, women- and majority-owned firms available for entity contracts and developed dollar-weighted estimates of MBE/WBE availability based on analysis of individual entity prime contracts and subcontracts. Appendix D further explains the availability data collection methodology in six parts:

- A. General approach to collecting availability information;
- B. Development of the survey instruments;
- C. Execution of surveys;
- D. Businesses included in the availability database;
- E. Additional considerations related to measuring availability; and
- F. The survey instrument.

#### **A. General Approach to Collecting Availability Information**

Keen Independent collected information from firms about their availability for public entity contracts through online and telephone surveys.

**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 participating entities as interested in learning about future work, such as registering with the State through SWIFT (referred to here as “interested firms”).
- Businesses that Dun & Bradstreet (D&B) identified in certain subindustries related to entity procurement that had locations in Minnesota or the two Wisconsin counties within the Minneapolis-St. Paul MSA (D&B’s Hoover’s business establishment database).

The availability analysis focused on companies in Minnesota and two counties in Wisconsin (St. Croix and Pierce counties) performing types of work most relevant to entity construction, professional services, goods and other services contracts (including subcontracts). As such, Keen Independent did not include all of the listings in the interested firms lists or D&B database in the list of firms to be contacted in the availability survey, as described below.

Public entity interested firm lists and related sources of information. Participating entities provided several lists of businesses that identified themselves as interested in learning about those organizations' contract opportunities. The lists included:

- SWIFT — Businesses and individuals interested in doing business with the State of Minnesota can register as a vendor on the StateWide Integrated Financial Tools (SWIFT) internet portal. Minnesota Department of Administration and Minnesota State provided a list of businesses registered in SWIFT.
- Virtual Plan Room — Businesses and individuals can download construction plans and specifications for the Department of Administration, Military Affairs, Natural Resources, Transportation and Minnesota State via Franz Reprographics Services. The Minnesota Department of Administration provided Keen Independent a list of firms that have registered and/or downloaded bid documentation via Franz Reprographics.
- Document Holders — Businesses and individuals can view and/or download contract plan documents or project plans for Metropolitan Council via QuestCDN eBidDoc™. Firms that download a plan are added to a Document Holder list. Metropolitan Council provided this information to Keen Independent.
- Email subscription — City of Minneapolis Finance and Property Services provides an opportunity for businesses and individuals to sign up for email updates on requests for proposals, formal bids and informal bids. The City provided this list to Keen Independent.
- Internal Vendor Lists — Different entities maintain internal lists of potential vendors, which they provided to Keen Independent as well:
  - Minnesota State has a list of potential vendors that receive notifications of upcoming RFP opportunities.
  - Metropolitan Airports Commission (MAC) has a “spreadsheet of vendors” that includes firms that have contacted MAC directly via personal meetings, phone or email, or have previously won a contract.
  - City of Saint Paul keeps an “outreach vendor list” that includes vendors, CERT-certified firms and businesses registered in GovDelivery.com.
  - City of Minneapolis Civil Rights Department maintains an internal list of small businesses interested in doing business with the City.
- GovDelivery.com — Businesses and individuals can register with GovDelivery.com to receive procurement alerts. The City of Minneapolis, City of Saint Paul and Hennepin County subscribe to the GovDelivery platform. Keen Independent obtained a list of interested vendors from this source.

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 Minnesota or the two Wisconsin counties. (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 Hoover's database.** Because companies typically do not need to be on a participating entity list to bid on its procurements and subcontracts, Keen Independent supplemented these lists for the availability survey. Keen Independent identified additional firms in the Dun & Bradstreet (D&B) database that had locations in Minnesota and the two Wisconsin counties and performed work in relevant subindustries. (Dun & Bradstreet's Hoover's affiliate maintains the largest commercially-available database of U.S. businesses.)

Keen Independent identified relevant subindustries based on the types of work involved in entity procurement. The study team totaled the prime contract and subcontract dollars awarded for different types of work during the study period for each entity to determine the worktypes accounting for the most procurement dollars within construction, professional services, goods and other services contracts for that entity. Keen Independent then chose the firms identified by D&B doing business in the construction, professional services, goods and other services subindustries matching those types of work.

There were some types of work excluded from the analysis because entities primarily procure them from national rather than local markets (purchase of insecticides by the Mosquito Control District is one example).

D&B classifies types of work by 8-digit work specialization codes (based on SIC codes).<sup>1</sup> Figure D-1 on the following pages identifies the work specialization codes the study team determined were the most related to the combined participating entity contracts and subcontracts based on analysis of contract dollars.

Keen Independent obtained a list of firms from the D&B Hoover's database within relevant work codes that had locations within Minnesota and the two Wisconsin counties. 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 66,965 unique business listings for the availability surveys.

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."

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<sup>1</sup> D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Figure D-1. D&B 8-digit codes for availability list source

| Construction  |  |
|---|--|
| <b>Multifamily building construction</b>                              |  |
| 15220000  | Residential construction, nec                            |
| 15220101  | Apartment building construction                          |
| 15220102  | Co-op construction                                       |
| 15220103  | Condominium construction                                 |
| 15220106  | Multifamily dwelling construction, nec                   |
| 15220107  | Multifamily dwellings, new construction                  |
| 15220201  | Remodeling, multifamily dwellings                        |
| 15310000  | Operative builders                                       |
| 15319901  | Condominium developers                                   |
| 15319902  | Cooperative apartment developers                         |
| 15319903  | Speculative builder, multifamily dwellings               |
| 15319905  | Townhouse developers                                     |
| <b>School building construction</b>                                   |  |
| 15220104  | Dormitory construction                                   |
| 15420406  | School building construction                             |
| <b>Public or commercial building construction</b>                     |  |
| 15410000  | Industrial buildings and warehouses                      |
| 15419900  | Industrial buildings and warehouses, nec                 |
| 15419909  | Renovation, remodeling and repairs: industrial buildings |
| 15419910  | Steel building construction                              |
| 15420000  | Nonresidential construction, nec                         |
| 15420100  | Commercial and office building contractors               |
| 15420101  | Commercial and office building, new construction         |
| 15420102  | Commercial and office buildings, prefabricated erection  |
| 15420103  | Commercial and office buildings, renovation and repair   |
| 15420400  | Specialized public building contractors                  |
| 15420402  | Fire station construction                                |
| 15420403  | Hospital construction                                    |
| 15429900  | Nonresidential construction, nec                         |
| 15429901  | Custom builders, non-residential                         |
| 15429903  | Institutional building construction                      |
| 15429905  | Stadium construction                                     |
| <b>Excavation, site prep, grading and drainage</b>                    |  |
| 16290105  | Drainage system construction                             |
| 16290108  | Irrigation system construction                           |
| 16290112  | Pond 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                             |
| 17959901  | Concrete breaking for streets and highways               |
| 17959902  | Demolition, buildings and other structures               |
| 17959903  | Dismantling steel oil tanks                              |
| 17990900  | Building site preparation                                |
| <b>Building materials (see Goods)</b>                                 |  |
| <b>Construction management (see Professional Services)</b>            |  |
| <b>Landscape installation and maintenance (see Other services)</b>    |  |
| <b>Underground utilities, including water and sewer lines</b>         |  |
| 16230000  | Water, sewer and utility lines                           |
| 16230300  | Water and sewer line construction                        |
| 16230301  | Aqueduct construction                                    |
| 16230302  | Sewer line construction                                  |
| 16230303  | Water main construction                                  |
| 16239902  | Manhole construction                                     |
| 16239903  | Pipe laying construction                                 |
| 16239904  | Pipeline construction, nsk                               |
| 16239905  | Pumping station construction                             |
| 16239906  | Underground utilities contractor                         |
| <b>Plumbing, heating or air conditioning</b>                          |  |
| 17110000  | Plumbing, heating, air-conditioning                      |
| <b>Bridge or elevated highway construction</b>                        |  |
| 16220000  | Bridge, tunnel and elevated highway construction         |
| 16229901  | Bridge construction                                      |
| 16229902  | Highway construction, elevated                           |
| 16229903  | Tunnel construction                                      |
| 16229904  | Viaduct construction                                     |
| <b>Road construction or paving</b>                                    |  |
| 16110000  | Highway and street construction                          |
| 16110100  | Highway signs and guardrails                             |
| 16110200  | Surfacing and paving                                     |
| 16110201  | Airport runway construction                              |
| 16110202  | Concrete construction: roads, highways, sidewalks, etc.  |
| 16110203  | Grading  |
| 16110204  | Highway and street paving contractor                     |
| 16110205  | Resurfacing contractor                                   |
| 16110206  | Sidewalk construction                                    |
| 16110207  | Gravel or dirt road construction                         |
| 16119901  | General contractor, highway and street construction      |
| 16119902  | Highway and street maintenance                           |
| 16119903  | Highway reflector installation                           |
| 17210303  | Pavement marking contractor                              |
| 73899921  | Flagging service (traffic control)                       |
| <b>Installation of guardrails or signs</b>                            |  |
| 16110101  | Guardrail construction, highways                         |
| 16110102  | Highway and street sign installation                     |
| <b>Electrical work including lighting and signals</b>                 |  |
| 17310000  | Electrical work  |
| <b>Plastering, drywall or insulation</b>                              |  |
| 17420000  | Plastering, drywall and insulation                       |
| <b>Roofing</b>  |  |
| 17610000  | Roofing, siding and sheet metal work                     |
| <b>Concrete work</b>  |  |
| 17710000  | Concrete work  |
| <b>Structural steel work</b>  |  |
| 17910000  | Structural steel erection                                |
| <b>Sign and traffic control equipment rental (see Other services)</b> |  |
| <b>Trucking and hauling (see Other services)</b>                      |  |

Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Professional services                              |  |
|--|--|
| <b>Architecture and engineering</b>                |  |
| 87110000   | Engineering services                                 |
| 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                               |
| 87119900   | Engineering services, nec                            |
| 87119901   | Acoustical engineering                               |
| 87119903   | Consulting engineer                                  |
| 87120000   | Architectural services                               |
| 87120100   | Architectural engineering                            |
| 87120101   | Architectural engineering                            |
| <b>Construction management</b>                     |  |
| 87419902   | Construction management                              |
| 87420402   | Construction project management consultant           |
| <b>Advertising, marketing and public relations</b> |  |
| 73110000   | Advertising agencies                                 |
| 73119900   | Advertising agencies, nec                            |
| 73119901   | Advertising consultant                               |
| 87430000   | Public relations services                            |
| 87439900   | Public relations services, nec                       |
| <b>IT and data services</b>                        |  |
| 73710000   | Custom computer programming services                 |
| 73710100   | Custom computer programming services                 |
| 73710101   | Computer software systems analysis and design        |
| 73730200   | Systems integration services                         |
| 73730201   | Local area network (LAN) systems integrator          |
| 73730202   | Office computer automation systems integration       |
| 73730300   | Computer system selling services                     |
| 73730301   | Turnkey vendors, computer systems                    |
| 73730302   | Value-added resellers, computer systems              |
| 73730400   | Computer-aided system services                       |
| 73730401   | Computer-aided design (CAD) systems service          |
| 73730402   | Computer-aided engineering (CAE) systems service     |
| 73730403   | Computer-aided manufacturing (CAM) systems service   |
| 73740000   | Data processing and preparation                      |
| 73740100   | Computer processing services                         |
| 73740101   | Calculating service (computer)                       |
| 73740102   | Computer graphics service                            |
| 73740103   | Computer time-sharing                                |
| 73740104   | Service bureau, computer                             |
| 73749900   | Data processing and preparation, nec                 |
| 73749901   | Data entry service                                   |
| 73749902   | Data processing service                              |
| 73749903   | Data verification service                            |
| 73749904   | Key punch service                                    |
| 73749905   | Optical scanning data service                        |
| 73749906   | Tabulating service                                   |
| 73750000   | Information retrieval services                       |
| 73759900   | Information retrieval services, nec                  |
| 73759901   | Data base information retrieval                      |
| 73759902   | On-line data base information retrieval              |
| 73759903   | Remote data base information retrieval               |
| 73790000   | Computer related services, nec                       |
| 73790100   | Computer related maintenance services                |
| 87480302   | Telecommunications consultant                        |
| 87480400   | Systems analysis and engineering consulting services |
| 87480401   | Systems analysis or design                           |
| 87480402   | Systems engineering consultant                       |
| <b>Environmental consulting</b>                    |  |
| 87310302   | Environmental research                               |
| 87489905   | Environmental consultant                             |
| <b>Business research and consulting</b>            |  |
| 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                          |
| 87320107   | Opinion research                                     |
| 87320108   | Research services, except laboratory                 |
| 87320200   | Commercial sociological and educational research     |
| 87320201   | Educational research                                 |
| 87320202   | Sociological research                                |
| 87410000   | Management services                                  |
| 87410100   | Business management                                  |
| 87410101   | Administrative management                            |
| 87410103   | Office management                                    |
| 87410104   | Personnel management                                 |
| 87419900   | Management services, nec                             |
| 87419906   | Hospital management                                  |
| 87419907   | Nursing and personal care facility management        |
| 87420000   | Management consulting services                       |
| 87420103   | Industrial hygiene consultant                        |
| 87420104   | Maintenance management consultant                    |
| 87420105   | Management engineering                               |
| 87420200   | Human resource consulting services                   |
| 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                  |
| 87420300   | Marketing consulting services                        |
| 87420301   | Distribution channels consultant                     |
| 87489900   | Business consulting, nec                             |
| 87489902   | Educational consultant                               |
| <b>Inspection and testing</b>                      |  |
| 07119906   | Soil testing services                                |
| 73890201   | Air pollution measuring service                      |
| 73890203   | Building inspection service                          |
| 73890209   | Pipeline and power line inspection service           |
| 73890211   | Sewer inspection service                             |
| 87340000   | Testing laboratories                                 |
| 87340100   | Radiation laboratories                               |
| 87340103   | Welded joint radiographing                           |
| 87340104   | X-ray inspection service, industrial                 |
| 87340300   | Pollution testing                                    |
| 87340301   | Hazardous waste testing                              |
| 87349900   | Testing laboratories, nec                            |
| 87349905   | Hydrostatic testing laboratory                       |
| 87349907   | Metallurgical testing laboratory                     |
| 87349909   | Soil analysis  |
| 87349911   | Water testing laboratory                             |
| 89990700   | Earth science services                               |
| 89990701   | Geological consultant                                |
| 89990702   | Geophysical consultant                               |
| <b>Benefits management</b>                         |  |
| 64119906   | Medical insurance claim processing                   |
| 87420201   | Compensation and benefits planning consultant        |
| 87489903   | Employee programs administration                     |

Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Other services                                   |  |
|--|--|
| <b>Landscape installation and maintenance</b>    |  |
| 07820000   | Lawn and garden services                                     |
| 07830000   | Ornamental shrub and tree services                           |
| <b>Local transportation services</b>             |  |
| 41110100   | Bus transportation   |
| 41110200   | Street and trolley car transportation                        |
| 41110300   | Airport transportation                                       |
| 41190000   | Local passenger transportation, nec                          |
| 41199902   | Ambulance service  |
| 41199906   | Vanpool operation  |
| <b>Parking services</b>                          |  |
| 75210000   | Automobile parking   |
| <b>Physical exam and testing</b>                 |  |
| 80990200   | Physical examination and testing services                    |
| <b>Printing and copying</b>                      |  |
| 27410000   | Miscellaneous publishing                                     |
| 27520000   | Commercial printing, lithographic                            |
| 73340000   | Photocopying and duplicating services                        |
| <b>Security guard services</b>                   |  |
| 73810100   | Guard services   |
| 73810102   | Burglary protection service                                  |
| 73810104   | Protective services, guard                                   |
| 73810105   | Security guard service                                       |
| <b>Security systems services</b>                 |  |
| 73820000   | Security systems services                                    |
| <b>Sewer cleaning and inspection</b>             |  |
| 73890211   | Sewer inspection service                                     |
| 76990403   | Sewer cleaning and rodding                                   |
| <b>Sign and traffic control equipment rental</b> |  |
| 73599908   | Sign rental  |
| 73599912   | Work zone traffic equipment (flags, cones, barrels, etc.)    |
| <b>Snow removal services</b>                     |  |
| 49590101   | Snowplowing  |
| <b>Staffing services</b>                         |  |
| 73610000   | Employment agencies  |
| 73610100   | Placement agencies   |
| 73610101   | Executive placement  |
| 73610102   | Labor contractors (employment agency)                        |
| 73630000   | Help supply services   |
| 73630100   | Labor resource services                                      |
| 73630101   | Employee leasing service                                     |
| 73630102   | Manpower pools   |
| 73630103   | Temporary help service                                       |
| 73639900   | Help supply services, nec                                    |
| 73639903   | Engineering help service                                     |
| 73639907   | Office help supply service                                   |
| <b>Trucking and hauling</b>                      |  |
| 42120000   | Local trucking, without storage                              |
| 42120200   | Liquid transfer services                                     |
| 42120201   | Liquid haulage, local  |
| 42120202   | Petroleum haulage, local                                     |
| 42129904   | Drying, 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                                    |
| 42139908   | Liquid petroleum transport, non-local                        |
| <b>Vehicle repair</b>                            |  |
| 75320400   | Exterior repair services                                     |
| 75320401   | Body shop, automotive  |
| 75320402   | Body shop, trucks  |
| 75320403   | Bump shops, automotive repair                                |
| 75320404   | Collision shops, automotive                                  |
| 75320405   | Tops (canvas or plastic), installation or repair: automotive |
| 75329900   | Top and body repair and paint shops, nec                     |
| 75330000   | Auto exhaust system repair shops                             |
| 75360000   | Automotive glass replacement shops                           |
| 75370000   | Automotive transmission repair shops                         |
| 75380000   | General automotive repair shops                              |
| 75390000   | Automotive repair shops, nec                                 |
| 75399900   | Automotive repair shops, nec                                 |
| 75490102   | Inspection and diagnostic service, automotive                |
| 75490103   | Lubrication service, automotive                              |
| <b>Waste collection and disposal</b>             |  |
| 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                                   |
| <b>Helicopter services</b>                       |  |
| 45229904   | Helicopter carriers, nonscheduled                            |



Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Other services (continued)              |  |
|---|--|
| <b>Building cleaning</b>                |  |
| 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, nec                     |
| 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                       |
| 73499902                                | Cleaning service, industrial or commercial             |
| <b>Construction equipment rental</b>    |  |
| 73530000                                | Heavy construction equipment rental                    |
| 73539900                                | Heavy construction equipment rental, nec               |
| 73539901                                | Cranes and aerial lift equipment, rental or leasing    |
| 73539902                                | Earth moving equipment, rental or leasing              |
| <b>Contracted food service</b>          |  |
| 58129906                                | Contract food services                                 |
| <b>Facilities operation and support</b> |  |
| 87440000                                | Facilities support services                            |
| 87449900                                | Facilities support services, nec                       |
| 87449902                                | Correctional facility                                  |
| 87449903                                | Jails, privately operated                              |
| <b>Equipment repair services</b>        |  |
| 76290000                                | Electrical repair shops                                |
| 76290100                                | Electrical personal use appliance repair               |
| 76290101                                | Hearing aid repair                                     |
| 76290102                                | Razor repair, electric                                 |
| 76290200                                | Electrical equipment repair services                   |
| 76290201                                | Electrical equipment repair, high voltage              |
| 76290202                                | Electrical measuring instrument repair and calibration |
| 76290203                                | Electronic equipment repair                            |
| 76290300                                | Electrical household appliance repair                  |
| 76290301                                | Lamp repair and mounting                               |
| 76290302                                | Telephone set repair                                   |
| 76290303                                | Vacuum cleaner repair                                  |
| 76299900                                | Electrical repair shops, nec                           |
| 76299901                                | Aircraft electrical equipment repair                   |
| 76299902                                | Business machine repair, electric                      |
| 76299903                                | Circuit board repair                                   |
| 76299904                                | Generator repair                                       |
| 76299905                                | Telecommunication equipment repair (except telephones) |
| 76299906                                | Tool repair, electric                                  |
| 76990500                                | Industrial equipment services                          |
| 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                                |
| 76990507                                | Pallet repair  |
| 76990508                                | Valve repair, industrial                               |
| <b>Elevator services</b>                |  |
| 76992501                                | Elevators: inspection, service, and repair             |

Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Goods                     |   |   |
|---------------------------|---|---|
| <b>Building materials</b> |   |   |
| 29110501                  | Asphalt or asphaltic materials, made in refineries  | 34430120 Tanks for tank trucks, metal plate                       |
| 29110505                  | Road materials, bituminous                          | 34430200 Heat exchangers, condensers and components               |
| 29110506                  | Road oils   | 34430300 Boiler and boiler shop work                              |
| 29110507                  | Tar or residuum                                     | 34430600 Liners/lining  |
| 29510000                  | Asphalt paving mixtures and blocks                  | 34430700 Metal parts  |
| 29520000                  | Asphalt felts and coatings                          | 34430800 Chutes and troughs                                       |
| 29520100                  | Roofing materials                                   | 34430900 Pipe, standpipe and culverts                             |
| 30890300                  | Plastics hardware and building products             | 34440000 Sheet metalwork  |
| 32419901                  | Masonry cement                                      | 34460000 Architectural metalwork                                  |
| 32419902                  | Natural cement                                      | 34480000 Prefabricated metal buildings and components             |
| 32419903                  | Portland cement                                     | 34480100 Prefabricated metal buildings                            |
| 32419904                  | Pozzolana cement                                    | 34490100 Fabricated bar joists and concrete reinforcing bars      |
| 32510000                  | Brick and structural clay tile                      | 34490200 Metal plaster bases                                      |
| 32530000                  | Ceramic wall and floor tile                         | 34499900 Miscellaneous metalwork, nec                             |
| 32550000                  | Clay refractories                                   | 35340000 Elevators and moving stairways                           |
| 32590000                  | Structural clay products, nec                       | 35340100 Elevators and equipment                                  |
| 32610000                  | Vitreous plumbing fixtures                          | 35340102 Stair elevators, motor powered                           |
| 32640000                  | Porcelain electrical supplies                       | 35349900 Elevators and moving stairways, nec                      |
| 32649900                  | Porcelain electrical supplies, nec                  | 35350102 Passenger baggage belt loaders                           |
| 32649901                  | Cleats, porcelain                                   | 35640000 Blowers and fans   |
| 32649902                  | Ferrite and ferrite parts                           | 35850000 Refrigeration and heating equipment                      |
| 32649903                  | Insulators, electrical: porcelain                   | 35850100 Air conditioning equipment, complete                     |
| 32649904                  | Knobs, porcelain                                    | 35850101 Air conditioning units, complete: domestic or industrial |
| 32710000                  | Concrete block and brick                            | 35850200 Refrigeration equipment, complete                        |
| 32720000                  | Concrete products, nec                              | 35850300 Heating equipment, complete                              |
| 32730000                  | Ready-mixed concrete                                | 35850400 Parts for heating, cooling and refrigerating equipment   |
| 32810300                  | Building stone products                             | 35850505 Drinking fountains, mechanically refrigerated            |
| 32810400                  | Slate products                                      | 35850600 Humidifiers and dehumidifiers                            |
| 32810600                  | Curbing, paving and walkway stone                   | 35859900 Refrigeration and heating equipment, nec                 |
| 32819900                  | Cut stone and stone products, nec                   | 35859901 Heating and air conditioning combination units           |
| 32990000                  | Nonmetallic mineral products                        | 36690200 Transportation signaling devices                         |
| 32990100                  | Mica products                                       | 36690201 Highway signals, electric                                |
| 32990200                  | Sand lime products                                  | 36690203 Pedestrian traffic control equipment                     |
| 32990300                  | Ornamental and architectural plaster work           | 36690205 Signaling apparatus, electric                            |
| 32999902                  | Floor composition, magnesite                        | 36690206 Traffic signals, electric                                |
| 33120400                  | Structural and rail mill products                   | 50310000 Lumber, plywood, and millwork                            |
| 33120500                  | Bar, rod and wire products                          | 50320000 Brick, stone, and related material                       |
| 33120600                  | Pipes and tubes                                     | 50330000 Roofing, siding, and insulation                          |
| 33150000                  | Steel wire and related products                     | 50390000 Construction materials, nec                              |
| 33170000                  | Steel pipe and tubes                                | 50510000 Metals service centers and offices                       |
| 33210000                  | Gray and ductile iron foundries                     | 50630504 Signaling equipment, electrical                          |
| 33210100                  | Cast iron pipe and fittings                         | 50720000 Hardware   |
| 33210101                  | Pressure pipe and fittings, cast iron               | 50740000 Plumbing and hydronic heating supplies                   |
| 33210102                  | Sewer pipe, cast iron                               | 50750000 Warm air heating and air conditioning                    |
| 33210103                  | Soil pipe and fittings, cast iron                   | 50780000 Refrigeration equipment and supplies                     |
| 33210104                  | Water pipe, cast iron                               | 50990304 Reflective road markers                                  |
| 33219900                  | Gray and ductile iron foundries, nec                | 50999912 Signs, except electric                                   |
| 33219905                  | Manhole covers, metal                               | 52110000 Lumber and other building materials                      |
| 34290100                  | Furniture, builders' and other household hardware   | 52310000 Paint, glass and wallpaper                               |
| 34290101                  | Builders' hardware                                  |   |
| 34290102                  | Cabinet hardware                                    |   |
| 34290103                  | Door opening and closing devices, except electrical | <b>Cars and trucks</b>  |
| 34290200                  | Keys, locks and related hardware                    | 37110201 Motor trucks, except off-highway, assembly of            |
| 34310000                  | Metal sanitary ware                                 | 37110203 Trucks, pickup, assembly of                              |
| 34320000                  | Plumbing fixture fittings and trim                  | 37110411 Wreckers (tow truck), assembly of                        |
| 34330000                  | Heating equipment, except electric                  | 37130000 Truck and bus bodies                                     |
| 34410000                  | Fabricated structural metal                         | 37130100 Truck bodies and parts                                   |
| 34410200                  | Fabricated structural metal for bridges             | 37130101 Truck beds   |
| 34419900                  | Fabricated structural metal, nec                    | 37130102 Truck bodies (motor vehicles)                            |
| 34420000                  | Metal doors, sash and trim                          | 37130103 Truck cabs, for motor vehicles                           |
| 34430000                  | Fabricated plate work (boiler shop)                 | 37130104 Truck tops   |
| 34430100                  | Industrial vessels, tanks and containers            | 37130200 Specialty motor vehicle bodies                           |
| 34430101                  | Autoclaves, industrial                              | 37130201 Ambulance bodies   |
| 34430102                  | Bins, prefabricated metal plate                     | 37130202 Automobile wrecker truck bodies                          |
| 34430103                  | Columns (fractioning, etc.): metal plate            | 50120102 Automobiles  |
| 34430104                  | Cryogenic tanks, for liquids and gases              | 50120103 Trucks, noncommercial                                    |
| 34430105                  | Cyclones, industrial: metal plate                   | 50120200 Commercial vehicles                                      |
| 34430106                  | Digesters, process: metal plate                     | 50120201 Ambulances   |
| 34430107                  | Drums, knockout (reflux etc.): metal plate          | 50120208 Trucks, commercial                                       |
| 34430108                  | Dumpsters, garbage                                  | 50120209 Vans, commercial   |
| 34430119                  | Tank towers, metal plate                            | 55110000 New and used car dealers                                 |
|                           |   | 55119900 New and used car dealers, nec                            |

Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Goods (continued)                   |  |
|-------------------------------------|--|
| <b>Communications equipment</b>     |  |
| 36610000                            | Telephone and telegraph apparatus                            |
| 36630000                            | Radio and television communications equipment                |
| 36690000                            | Communications equipment, nec                                |
| 50650100                            | Telephone and telegraphic equipment                          |
| 50650200                            | Communication equipment                                      |
| 50650400                            | Radio and television equipment and parts                     |
| 50659901                            | Diskettes, computer  |
| 50659902                            | Magnetic recording tape                                      |
| 50659903                            | Security control equipment and systems                       |
| 50659904                            | Tapes, audio and video recording                             |
| 50990500                            | Video and audio equipment                                    |
| 59990601                            | Audio-visual equipment and supplies                          |
| 59990602                            | Communication equipment                                      |
| 59990603                            | Telephone equipment and systems                              |
| <b>Electrical equipment</b>         |  |
| 36250000                            | Relays and industrial controls                               |
| 36290000                            | Electrical industrial apparatus, nec                         |
| 36990000                            | Electrical equipment and supplies, nec                       |
| 50630000                            | Electrical apparatus and equipment                           |
| 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                          |
| <b>Food</b>                         |  |
| 20510000                            | Bread, cake and related products                             |
| 20530000                            | Frozen bakery products, except bread                         |
| 51410000                            | Groceries, general line                                      |
| 51420000                            | Packaged frozen goods  |
| 51430000                            | Dairy products, except dried or canned                       |
| 51440000                            | Poultry and poultry products                                 |
| 51450000                            | Confectionery  |
| 51460000                            | Fish and seafood   |
| 51470000                            | Meats and meat products                                      |
| 51480000                            | Fresh fruits and vegetables                                  |
| 51490000                            | Groceries and related products, nec                          |
| 51490100                            | Cooking oils and shortenings                                 |
| 51490300                            | Seasonings, sauces and extracts                              |
| 51490400                            | Pasta and rice   |
| 51490500                            | Beverages, except coffee and tea                             |
| 51490600                            | Organic and diet food  |
| 51490700                            | Crackers, cookies and bakery products                        |
| 51490800                            | Dried or canned foods  |
| 51490900                            | Coffee and tea   |
| 51491000                            | Sugar, honey, molasses and syrups                            |
| 51491100                            | Baking supplies  |
| 51499900                            | Groceries and related products, nec                          |
| <b>Furniture</b>                    |  |
| 25210000                            | Wood office furniture  |
| 25220000                            | Office furniture, except wood                                |
| 25310000                            | Public building and related furniture                        |
| 25310100                            | School furniture   |
| 25310101                            | Blackboards, wood  |
| 25310400                            | Stadium furniture  |
| 25310401                            | Bleacher seating, portable                                   |
| 25310402                            | Stadium seating  |
| 25319900                            | Public building and related furniture, nec                   |
| 25319901                            | Assembly hall furniture                                      |
| 25319902                            | Benches for public buildings                                 |
| 25319903                            | Chairs, portable folding                                     |
| 25319904                            | Chairs, table and arm  |
| 25319905                            | Library furniture  |
| 25319906                            | Seats, miscellaneous public conveyances                      |
| 25319907                            | Theater furniture  |
| 25319908                            | Picnic tables or benches, park                               |
| 25410000                            | Wood partitions and fixtures                                 |
| 25410100                            | Store and office display cases and fixtures                  |
| 25410104                            | Office fixtures, wood  |
| 25410200                            | Cabinets, lockers and shelving                               |
| 25410201                            | Cabinets, except refrigerated: show, display, etc.: wood     |
| 25410202                            | Lockers, except refrigerated: wood                           |
| 25410203                            | Shelving, office and store, wood                             |
| 25420000                            | Partitions and fixtures, except wood                         |
| 25420200                            | Office and store showcases and display fixtures              |
| 25420204                            | Fixtures, office: except wood                                |
| 25420206                            | Fixtures: display, office or store: except wood              |
| 25429900                            | Partitions and fixtures, except wood, nec                    |
| 25990202                            | Cafeteria furniture  |
| 25990301                            | Hospital beds  |
| 25999907                            | Hospital furniture, except beds                              |
| <b>Heavy construction equipment</b> |  |
| 35310000                            | Construction machinery                                       |
| 35310400                            | Bituminous, cement and concrete related products and equip.  |
| 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                              |
| 50830200                            | Lawn and garden machinery and equipment                      |

Figure D-1. D&B 8-digit codes for availability list source (cont.)

| Goods (continued)  |  |
|--|--|
| <b>Industrial equipment</b>                                    | <b>Office supplies</b>   |
| 34910000 Industrial valves                                     | 39530000 Marking devices   |
| 34920000 Fluid power valves and hose fittings                  | 39550000 Carbon paper and inked ribbons                            |
| 34940000 Valves and pipe fittings, nec                         | 51110000 Printing and writing paper                                |
| 35240000 Lawn and garden equipment                             | 51120000 Stationery and office supplies                            |
| 35370000 Industrial trucks and tractors                        | 51999918 Packaging materials                                       |
| 35480000 Welding apparatus                                     | 59430000 Stationery stores   |
| 35610000 Pumps and pumping equipment                           |  |
| 35890300 Sewage and water treatment equipment                  | <b>Petroleum</b>   |
| 35899900 Service industry machinery, nec                       | 29110000 Petroleum refining  |
| 35940000 Fluid power pumps and motors                          | 29110100 Gases and liquefied petroleum gases                       |
| 35960000 Scales and balances, except laboratory                | 29110101 Gas, refinery   |
| 35969900 Scales and balances, except laboratory, nec           | 29110102 Liquefied petroleum gases, LPG                            |
| 35990000 Industrial machinery, nec                             | 29110200 Light distillates   |
| 36910000 Storage batteries                                     | 29110201 Alkylates   |
| 38230000 Process control instruments                           | 29110202 Gasoline blending plants                                  |
| 38240000 Fluid meters and counting devices                     | 29110203 Jet fuels   |
| 38240100 Integrating and totalizing meters for gas and liquids | 29110204 Kerosene  |
| 38249900 Fluid meters and counting devices, nec                | 29110205 Naphtha   |
| 38249901 Controls, revolution and timing instruments           | 29110206 Solvents  |
| 38249902 Gauges for computing pressure temperature corrections | 29110300 Intermediate distillates                                  |
| 38249903 Parking meters  | 29110301 Acid oil  |
| 50840000 Industrial machinery and equipment                    | 29110302 Diesel fuels  |
| 50850000 Industrial supplies                                   | 29110303 Oils, fuel  |
| 50990300 Safety equipment and supplies                         | 29110304 Oils, illuminating  |
| 50990301 Fire extinguishers                                    | 29110305 Oils, partly refined: sold for rerunning                  |
| 50990302 Lifesaving and survival equipment (non-medical)       | 29110306 Still oil   |
| 50990303 Locks and lock sets                                   | 29110400 Heavy distillates   |
|  | 29110401 Mineral jelly   |
| <b>Medical equipment</b>                                       | 29110402 Mineral oils, natural                                     |
| 38410000 Surgical and medical instruments                      | 29110403 Mineral waxes, natural                                    |
| 38429900 Surgical appliances and supplies, nec                 | 29110404 Oils, lubricating   |
| 38440000 X-ray apparatus and tubes                             | 29110405 Paraffin wax  |
| 38450000 Electromedical equipment                              | 29110500 Residues  |
| 50470000 Medical and hospital equipment                        | 29110503 Greases, lubricating                                      |
| 50470100 Hospital equipment and furniture                      | 29110504 Petrolatums, nonmedicinal                                 |
| 50470300 Medical equipment and supplies                        | 29110505 Road materials, bituminous                                |
| 50479900 Medical and hospital equipment, nec                   | 29920000 Lubricating oils and greases                              |
| 50479901 Industrial safety devices: first aid kits and masks   | 51710000 Petroleum bulk stations and terminals                     |
| 50479902 Veterinarians' equipment and supplies                 | 59830000 Fuel oil dealers  |
| 50479903 X-ray film and supplies                               | 59840000 Liquefied petroleum gas dealers                           |
|  | 59849900 Liquefied petroleum gas dealers, nec                      |
| <b>Office equipment</b>  | 59849902 Liquefied petroleum gas, delivered to customers' premises |
| 35550000 Printing trades machinery                             | 59890000 Fuel dealers, nec   |
| 35550100 Printing presses                                      | 59899900 Fuel dealers, nec   |
| 35550101 Presses, envelope, printing                           |  |
| 35550102 Presses, gravure                                      | <b>Pharmaceuticals</b>   |
| 35550200 Printing plates                                       | 28330000 Medicinals and botanicals                                 |
| 35550201 Plates, metal: engravers'                             | 28340000 Pharmaceutical preparations                               |
| 35550202 Plates, offset  | 28350000 Diagnostic substances                                     |
| 35550300 Printing trade parts and attachments                  | 28360000 Biological products, except diagnostic                    |
| 35550301 Copy holders, printers'                               | 28999952 Drug testing kits, blood and urine                        |
| 35550302 Gallies or chases, printers'                          | 51220300 Drugs and drug proprietaries                              |
| 35550303 Leads, printers'                                      | 51229900 Drugs, proprietaries and sundries, nec                    |
| 35550304 Mats, advertising and newspaper                       |  |
| 35550305 Planes, printers'                                     | <b>Vehicle parts and supplies</b>                                  |
| 35550306 Rules, printers'                                      | 50130000 Motor vehicle supplies and new parts                      |
| 35550307 Slugs, printers'                                      | 55310103 Automotive parts  |
| 35550308 Sticks, printers'                                     | 55310104 Batteries, automotive and truck                           |
| 35790000 Office machines, nec                                  | 55310107 Truck equipment and parts                                 |
| 50440000 Office equipment                                      |  |

**Online surveys.** For firms on the interested firms list (described above) that had email addresses, the State of Minnesota distributed a request to complete the online availability survey through the eGovDelivery list service. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses and manage the online component of the survey.

The online survey successfully obtained completed surveys from some firms but not the majority of the contact list. Some firms did not respond to the survey, but the primary reason was that Keen Independent did not have an email address for the firm.

**Telephone surveys.** After completing the online phase of the survey, CRI used the following steps to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to four 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 Minnesota and other participating entities for purposes of expanding their lists of companies interested in performing their work.
- Some firms indicated in the phone calls that they did not perform relevant work or had no interest in work with participating entities, so no further survey was necessary. (Such surveys were treated as complete at that point.)

**Other avenues to complete a survey.** Even if a company was not directly contacted by the study team, business owners could complete a survey for their company online or request a fax version of the survey.

## **B. Development of the Survey Instruments**

Keen Independent developed the survey instruments through the following steps:

- Keen Independent drafted an availability survey instrument; and
- Participating entity staff and ESG members had an opportunity to review the draft survey instrument. A preliminary availability survey instrument was also published in the Phase 1 Report in early 2017.

The final survey instrument is presented at the end of this appendix.

**Survey structure.** The availability survey included ten sections. The study team did not know the race, ethnicity or gender of the business owner when calling (or emailing) 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 Minnesota and other participating entities as the survey sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working with State agencies and colleges as well as local governments serving the Twin Cities, including Hennepin County, the cities of Minneapolis and St. Paul, Met Council, the Airport and the Mosquito Control District” on construction, professional services, goods and other services contracts).
- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.
- **Contact information.** CRI then collected complete contact information for the establishment and the individual who completed the survey.
- **Verification of work related to public sector projects.** The interviewer asked whether the organization does construction or provides any goods or services on public sector projects (Question 1). Interviewers continued the survey with businesses that responded “yes” to that question.
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question 2). Interviewers continued the 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 professional services businesses, respondents then chose from a list of work types that their firm performed (interviewees could select multiple work types).
- **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.)
- **Whether the company was an affiliate or independent business.** The interviewer then asked if the company was a subsidiary or affiliate of another firm and, for those who answered “yes,” asked for the name of the other firm.
- **Past bids or work related to public agencies.** The survey then asked about bids and work on past public sector contracts in Minnesota. The questions were asked in connection with both prime contracts and subcontracts.

- **Qualifications and interest in future public sector work.** The interviewer asked about businesses' qualifications and interest in future work with public agencies in Minnesota, and for some firms, whether they were interested in prime contracts and/or subcontracts. (Keen Independent did not ask companies providing goods whether they were interested in working as subcontractors as this is less relevant than in construction or for professional services.)
- **Geographic areas.** Interviewees were asked whether they could do work in six different geographic regions of Minnesota.
- **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 Minnesota during the past six years.
- **Ownership.** Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. For companies which identified as "other," Keen Independent reviewed and assigned the correct minority classification when possible and otherwise identified them as "Majority." For a duplicate response with "Don't know" or "Refused," priority was given to the responses with "yes" or "no" and specific racial information.
- **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 Minnesota. In addition, this section included a question asking whether interviewees would be willing to participate in an in-depth interview about marketplace conditions.

### **C. Execution of Surveys**

Keen Independent contracted with Customer Research International (CRI), a survey research firm, to complete the telephone and online survey work. CRI has extensive experience performing similar interviews for disparity studies throughout the country. CRI launched the online component of the survey in mid-May 2017 and conducted availability surveys over the phone from mid-June 2017 through late August 2017. Interested firms could also complete surveys by visiting the disparity study website.

To minimize non-response, CRI made at least four attempts at different times of day and on different days of the week to reach each business establishment over the phone (in addition to any contacts via email). 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.** Figure D-2 presents the disposition 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 combined both the interested firms list and D&B business establishments. The interested firms list included 14,854 businesses, which Keen Independent supplemented with D&B businesses, for a total beginning list of 66,936 business establishments.

**Non-working or wrong phone numbers.** Some of the business listings that the study team attempted to contact turned out to be:

- Non-working phone numbers (5,849); or
- Wrong numbers for the desired businesses (346).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.

**Figure D-2.**  
Disposition of  
attempts to survey  
business  
establishments

**Note:**

Study team made at least four attempts to complete an interview with each establishment.

**Source:**

Keen Independent from 2017 Availability Surveys.

|  | Number<br>of firms | Percent of<br>business<br>listings |
|--|--------------------|------------------------------------|
| <b>Interested vendors list</b>                         | <b>14,854</b>      |                                    |
| <b>Including D&amp;B business establishments</b>       | <b>66,936</b>      |                                    |
| Less non-working phone numbers                         | 5,849              |                                    |
| Less wrong number                                      | 346                |                                    |
| <b>Firms with working phone numbers</b>                | <b>60,741</b>      | <b>100.0 %</b>                     |
| Less no answer   | 34,999             |                                    |
| Less could not reach responsible staff member          | 4,204              |                                    |
| Less could not continue in English or Spanish          | 33                 |                                    |
| Less unreturned fax/email                              | 805                |                                    |
| Less said they already completed the survey but didn't | 173                |                                    |
| <b>Firms successfully contacted</b>                    | <b>20,527</b>      | <b>33.8 %</b>                      |



**Working phone numbers.** As shown in Figure D-2, there were 60,741 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 four attempts at different times of the day and on different days of the week (34,999) establishments.
- **Could not reach responsible staff member.** For a small number of businesses (4,204), 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, when appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, the first questions of the instrument were asked in Spanish. If the firm appeared that it performed related work, the interviewer asked if the company would like to complete an email or faxed questionnaire (in English), which was then sent (not all firms completed the email or fax survey). This approach appeared to eliminate a majority of language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for only 33 companies (19 of which were a mix of languages other than Spanish).
- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax. There were 805 businesses that requested such surveys but did not return them.
- **Respondent indicated that they had already completed a survey.** There were 173 respondents who said that they had already completed a phone or online survey that were not found within the responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 20,527 businesses, or 34 percent of those with working phone numbers (or emails).

**Establishments included in the availability database.** Figure D-3 presents the disposition of the 20,527 businesses the study team successfully contacted and how that number resulted in the 5,064 businesses the study team included in the availability database.

Figure D-3.  
Disposition of  
successfully  
contacted  
businesses

Source:  
Keen Independent from  
2017 Availability Surveys.

|   | Number<br>of firms |
|---|--------------------|
| <b>Firms successfully contacted</b>                                   | <b>20,527</b>      |
| Less businesses not interested  | 12,332             |
| <b>Firms that completed interviews about business characteristics</b> | <b>8,195</b>       |
| Less not a for-profit business  | 3,059              |
| Less residence, not a business  | 43                 |
| Less duplicate responses  | 169                |
| <b>Firms included in availability database</b>                        | <b>4,924</b>       |
| <b>Plus available firms from online survey</b>                        | <b>140</b>         |
| <b>Total firms included in availability database</b>                  | <b>5,064</b>       |

Establishments not interested in discussing availability for public sector work. Of the 20,527 businesses that the study team successfully contacted, 12,332 were not interested in discussing their availability for public sector work. The study team interpreted those responses as “not interested” in public entity work. In Keen Independent’s experience, those types of responses are often firms that do not perform relevant types of work for the public sector.

Businesses included in the availability database. Some establishments completing availability surveys were not included in the final availability database:

- Of the completed surveys, 3,059 indicated that they were not a for-profit business (including non-profits or government agencies). Another 43 indicated that the call was to a residence and that there was no active business at that location. Surveys ended when respondents reported that their establishments were not for-profit businesses or that there was no company at that phone number.
- There were 169 duplicate responses excluded at this point of the analysis (answers were consolidated).

After those final screening steps, the phone survey effort produced a database of 4,924 businesses potentially available for public sector work. An additional 140 responses were collected online that were not on the initial contact list, for an overall final database of 5,064 available businesses.

**Coding responses from multi-location businesses.** As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

**Excluding responses from businesses outside the relevant geographic market area.** Keen Independent received 16 online surveys from firms that did not have a location within the relevant geographic market area. They were not included in the final availability database.

## D. Businesses Included in the Availability Database

From the completed interviews, the study team developed a database of information 5,064 businesses used in the availability analysis for participating entity work.

The availability survey allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of participating entity construction, professional services, goods and other services contracts, but the data should not be considered an exhaustive list of every business that could potentially participate in entity contracts (and subcontracts).

Figure D-4 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. Of the 5,064 businesses reporting that they were available for public sector contracts and subcontracts in Minnesota, 1,395 (28%) were MBEs or WBEs.

Figure D-4.  
Number of businesses  
included in the  
availability database

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

Source:  
Keen Independent availability  
analysis.

| Race/ethnicity and gender  | Number<br>of firms<br>in MSA | Number<br>of firms<br>outside MSA | Total number<br>of firms | Percent<br>of firms |
|----------------------------|------------------------------|-----------------------------------|--------------------------|---------------------|
| African American-owned     | 223                          | 17                                | 240                      | 4.7 %               |
| Asian American-owned       | 93                           | 8                                 | 101                      | 2.0                 |
| Hispanic American-owned    | 79                           | 14                                | 93                       | 1.8                 |
| Native American-owned      | 25                           | 11                                | 36                       | 0.7                 |
| Total MBE                  | 420                          | 50                                | 470                      | 9.2 %               |
| WBE (white women-owned)    | 738                          | 187                               | 925                      | 18.3                |
| Total MBE/WBE              | 1,158                        | 237                               | 1,395                    | 27.5 %              |
| Total majority-owned firms | 2,538                        | 1,131                             | 3,669                    | 72.5                |
| Total firms                | 3,696                        | 1,368                             | 5,064                    | 100.0 %             |

## E. Additional Considerations Related to Measuring Availability

There are several additional considerations related to Keen Independent's approach to measuring availability.

**Not providing a count of all businesses available for participating entity work.** The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for participating entity work. The purchase of additional lists from Dun & Bradstreet appropriately focused on firms in subindustries accounting for the most dollars of combined participating entity contracts. Subindustries that comprised a very small portion of participating entity contract dollars were not included in the D&B list. Keen Independent did not purchase Dun & Bradstreet data for firms outside Minnesota and the two counties in Wisconsin. And, not all firms on the list of businesses completed surveys, even after repeated attempts to contact them. Therefore, the availability analysis did not provide a comprehensive listing of *every* business that could be available for all types of participating entity work and should not be used in that way.

There were some firms receiving participating entity 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 participating entity work. Keen Independent's review of the firms receiving the most participating entity work that were not on the availability list found that, in

most cases, they were either located outside Minnesota or performed types of businesses outside the focus of the availability survey.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.<sup>2</sup>

**Not using a "headcount" based solely on participating entity lists.** USDOT guidance for determining MBE/WBE availability recommends dividing the number of businesses in an agency's DBE directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of MBE/WBEs for an agency's prime contracts and subcontracts.

Keen Independent used participating entity lists that included firms that expressed interest in participating entity work, but included other firms potentially available for those contracts as well. This helps capture firms that might have been discouraged from pursuing participating entity work and would not appear on those lists.

Keen Independent's approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses' qualifications, size of contracts they bid on and interest in participating entity 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 participating entities with Dun & Bradstreet business listings for Minnesota and two counties in Wisconsin. 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 Minnesota 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. (Even though small, home-based businesses are more likely than large businesses to be minority- or women-owned, further research shows no evidence that MBE/WBEs are underrepresented in the final availability database.)
- Some businesses providing pertinent work or goods might not be classified as such in the D&B data.

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<sup>2</sup> Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

Because Keen Independent used several participating entity data sources of business listings for the availability analysis as well as D&B lists, the final survey list captures firms not included in the D&B data.

**Selection of specific subindustries.** Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent's use of additional participating entity data mitigates this potential concern.

**Large number of companies reporting that they do not perform participating entity work or were not interested in discussing public sector work.** Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in discussing their availability for participating entity contracts or subcontracts. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

There were some companies that had actually performed participating entity contracts that responded in the availability survey that they were not interested in discussing their availability for participating entity work or did not perform relevant work. These firms accounted for a small share of such 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; and
- Language barriers.

**Research sponsorship.** Interviewers introduced themselves by identifying the State of Minnesota and other participating entities as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

**Differences in success reaching potential interviewees.** There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences did not lead to lower estimates of MBE/WBE availability than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete a survey is less important because the number of MBE/WBE trucking firms is compared with the number of total trucking firms when calculating availability for trucking work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B source) that were successfully contacted, MBE/WBE firms were just slightly more likely to be successfully contacted than majority-owned firms.<sup>3</sup> There is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

**Potential language barriers.** Because of the methods explained previously in this appendix, any language barriers were minimal. Only 33 establishments were not surveyed due to language barriers and less than one-half of these were because of Spanish-only speakers. Callbacks to firms when an initial call identified an individual who only spoke Spanish appeared to be effective.

Of the 19 not completed due to non-Spanish languages, there was a wide diversity of languages apparently spoken by the respondent (including languages from Europe other than Spanish). As a percentage of all working phone numbers, this is fewer than one company out of every 3,000. Therefore, 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.

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<sup>3</sup> From D&B ownership information alone, and not using survey responses or other sources of ownership information, MBE/WBEs were 7.4 percent of the initial list and 8.0 percent of successfully surveyed firms.

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 that the study team collected from participating entities. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses and was 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 participating entity contract data.
- Keen Independent used publicly-available information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys when answers were either incomplete or contradictory (for duplicates).

A copy of the survey instrument for construction follows.

**F. The Survey Instrument**  
**Minnesota Department of Administration Fax Survey**

The information developed in this survey will add to state and local governments' existing data on companies interested in working with state agencies and colleges, as well as local governments serving the Twin Cities, including Hennepin County, the cities of Minneapolis and St. Paul, Met Council, the Airport and the Mosquito Control District.

If you have any questions, please contact:

**Minnesota Department of Administration**  
**651-201-2455**

Z5. What is the name of your business?

\_\_\_\_\_

Z8. Address of business (if multiple offices, choose a Minnesota location if possible):

Street Address: \_\_\_\_\_

City (Required): \_\_\_\_\_

State (Required): \_\_\_\_\_

ZIP: \_\_\_\_\_

A1. Does your firm do any work related to public sector construction projects or multifamily construction?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

A2. Is your organization a business, as opposed to a non-profit organization, a foundation or a government office?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know



A4. What would you say is the main line of business of your company?

---

A5. Is the address of your business, as provided earlier, the sole location for your business, or do you have offices in other locations?

- ☐ 01=Sole location
- ☐ 02=Have other locations
- ☐ 98=Don't know

A6. Is your company a subsidiary or affiliate of another firm?

- ☐ 01=Independent [SKIP TO B1]
- ☐ 02=Subsidiary or affiliate of another firm
- ☐ 98=Don't know [SKIP TO B1]

A7. What is the name of your parent or affiliate company?

---

B1. What types of work does your firm perform related to construction? Select all that apply.

- ☐ 01=Multifamily building construction
- ☐ 02=School building construction
- ☐ 03=Public or commercial building construction
- ☐ 04=Construction management
- ☐ 05=Excavation, site prep, grading and drainage
- ☐ 06=Underground utilities, including water and sewer lines
- ☐ 07=Plumbing, heating or air conditioning
- ☐ 08=Bridge or elevated highway construction
- ☐ 09=Road construction or paving
- ☐ 10=Installation of guardrails or signs
- ☐ 11=Electrical work including lighting and signals
- ☐ 12=Plastering, drywall or insulation
- ☐ 13=Roofing
- ☐ 14=Concrete work
- ☐ 15=Structural steel work
- ☐ 16=Landscape installation and maintenance
- ☐ 17=Trucking and hauling
- ☐ 18=Construction materials supply
- ☐ 88=Other (Please specify)\_\_\_\_\_

---

The next questions are about your company's role in construction work.

C1. In Minnesota in the past six years, has your company bid on or been awarded work on a public sector project?

- ☐ 01=Yes
- ☐ 02=No [SKIP TO C3]
- ☐ 98=Don't know [SKIP TO C3]

C2. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

- ☐ 01=Prime contractor
- ☐ 02=Subcontractor
- ☐ 03=Supplier (or manufacturer)
- ☐ 04=Prime and sub
- ☐ 05=Sub and supplier
- ☐ 06=Prime and supplier
- ☐ 07=Prime, sub and supplier
- ☐ 98=Don't know

C3. Is your company qualified and interested in working with public agencies in Minnesota as a prime contractor?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

C4. Is your company qualified and interested in working with public agencies in Minnesota as a subcontractor?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

I1. Can your company do work in the Twin Cities metropolitan area?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

12. Can your company do work in Central Minnesota (such as St. Cloud or Willmar)?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

13. Can your company do work in the Northeast region of the state (such as Duluth)?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

14. Can your company do work in the Northwest region of the state (such as Brainerd or Moorhead)?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

15. Can your company do work in the Southeast region of the state (such as Rochester)?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

16. Can your company do work in the Southwest region of the state (such as Mankato or Worthington)?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

The next questions are about the firm's contract history.

D1. In rough dollar terms, what was the largest contract or subcontract your company was awarded (public or private) in Minnesota during the past six years? Includes contracts not yet completed.

- |   |   |
|---|---|
| <input type="radio"/> 01=\$100,000 or less              | <input type="radio"/> 07=\$10 million up to \$20 million  |
| <input type="radio"/> 02=\$100,000 up to \$500,000      | <input type="radio"/> 08=\$20 million up to \$100 million |
| <input type="radio"/> 03=\$500,000 up to \$1 million    | <input type="radio"/> 09=\$100 million or more            |
| <input type="radio"/> 04=\$1 million up to \$2 million  | <input type="radio"/> 97=None <b>[SKIP TO E1]</b>         |
| <input type="radio"/> 05=\$2 million up to \$5 million  | <input type="radio"/> 98=Don't know <b>[SKIP TO E1]</b>   |
| <input type="radio"/> 06=\$5 million up to \$10 million |   |

D2. Was this the largest contract or subcontract that your company bid on or submitted quotes for (public or private) in Minnesota during the past six years?

- ☐ 01=Yes **[SKIP TO E1]**  
☐ 02=No  
☐ 98=Don't know **[SKIP TO E1]**

D3. What was the largest contract or subcontract that your company bid on or submitted quotes for (public or private) in Minnesota during the past six years?

- |  |   |
|--|---|
| <input type="radio"/> 01=\$100,000 or less             | <input type="radio"/> 06=\$5 million up to \$10 million   |
| <input type="radio"/> 02=\$100,000 up to \$500,000     | <input type="radio"/> 07=\$10 million up to \$20 million  |
| <input type="radio"/> 03=\$500,000 up to \$1 million   | <input type="radio"/> 08=\$20 million up to \$100 million |
| <input type="radio"/> 04=\$1 million up to \$2 million | <input type="radio"/> 09=\$100 million or more            |
| <input type="radio"/> 05=\$2 million up to \$5 million | <input type="radio"/> 98=Don't know                       |

The next questions are about the ownership of the business.

- E1. A business is defined as woman-owned if more than half - that is, 51 percent or more - of the ownership and control is by women. By this definition, is your firm a woman-owned business?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 98=Don't know

- E2. A business is defined as minority-owned if more than half - that is, 51 percent or more - of the ownership and control is African American, Asian, Hispanic, Native American or another minority group. By this definition, is your firm a minority-owned business?

- ☐ 01=Yes
- ☐ 02=No **[SKIP TO F1]**
- ☐ 98=Don't know **[SKIP TO F1]**

- E3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American or Native American?

- ☐ 01=African American
- ☐ 02=Asian Pacific American
- ☐ 03=Hispanic American
- ☐ 04=Native American
- ☐ 05=Subcontinent Asian American
- ☐ 88=Other (Please specify) \_\_\_\_\_
- ☐ 98=Don't know

- F1. The next questions are about the background of the business. About what year was your firm established?

\_\_\_\_\_

The next set of questions pertains to annual averages for your company for 2014 through 2016 (or just years in business if formed after 2014).

- F3. On average, about how many employees did you have working out of just your location, identified earlier, from 2014 through 2016? (Includes employees who work at that location and those who work from that location)
- \_\_\_\_\_

- F5. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2014 through 2016?

- |   |   |
|---|---|
| <input type="radio"/> 01=Less than \$1 million            | <input type="radio"/> 07=\$20.6 million to 24 million     |
| <input type="radio"/> 02=\$1 million to \$5 million       | <input type="radio"/> 08=\$24.1 million to \$27.5 million |
| <input type="radio"/> 03=\$5.1 million to \$7.5 million   | <input type="radio"/> 09=\$27.6 million to \$36.5 million |
| <input type="radio"/> 04=\$7.6 million to \$11 million    | <input type="radio"/> 10=\$36.6 million to \$38.5 million |
| <input type="radio"/> 05=\$11.1 million to \$15 million   | <input type="radio"/> 11=More than \$38.5 million         |
| <input type="radio"/> 06=\$15.1 million to \$20.5 million | <input type="radio"/> 98=Don't know                       |

- F6. **[SKIP UNLESS A5=02("Have other locations")]**  
About how many employees did you have, on average, for all of your locations from 2014 through 2016? (Number of employees at all locations should not be fewer than at "just your location")
- \_\_\_\_\_

- F7. **[SKIP UNLESS A5=02("Have other locations")]**  
Roughly, what was the average annual gross revenue of your company, for all of your locations from 2014 through 2016 (or for the years your company was in business if started after 2014)?

[Revenue at all locations should not be less than at "just your location"]

- |   |   |
|---|---|
| <input type="radio"/> 01=Less than \$1 million            | <input type="radio"/> 07=\$20.6 million to 24 million     |
| <input type="radio"/> 02=\$1 million to \$5 million       | <input type="radio"/> 08=\$24.1 million to \$27.5 million |
| <input type="radio"/> 03=\$5.1 million to \$7.5 million   | <input type="radio"/> 09=\$27.6 million to \$36.5 million |
| <input type="radio"/> 04=\$7.6 million to \$11 million    | <input type="radio"/> 10=\$36.6 million to \$38.5 million |
| <input type="radio"/> 05=\$11.1 million to \$15 million   | <input type="radio"/> 11=More than \$38.5 million         |
| <input type="radio"/> 06=\$15.1 million to \$20.5 million | <input type="radio"/> 98=Don't know                       |

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion in your industry, or with obtaining work. Think about your experiences in the past six years as you answer these questions.

G1A. Has your company experienced any difficulties in obtaining lines of credit or loans?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1B. Has your company obtained or tried to obtain a bond for a project?

- ☐ 01=Yes
- ☐ 02=No [SKIP TO G1D]
- ☐ 97=Does not apply [SKIP TO G1D]
- ☐ 98=Don't know [SKIP TO G1D]

G1C. Has your company had any difficulties obtaining bonds needed for a project?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1D. Have you had any difficulty in being prequalified for work?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1E. Have any insurance requirements on projects presented a barrier to bidding?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1F. Has the large size of projects presented a barrier to bidding?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1G. Has your company experienced any difficulties learning about bid opportunities directly with public agencies in Minnesota?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1H. Has your company experienced any difficulties with learning about bid opportunities in the private sector in general in Minnesota?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1I. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors in Minnesota?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1J. Has your company experienced any difficulties receiving payment in a timely manner from public agencies in Minnesota?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know



G1K. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1L. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1M. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1O. Has your company experienced any difficulties with brand name specifications or other restrictions on bidding?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1P. Has your company experienced any difficulties obtaining supply or distributorship relationships?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G1Q. Has your company experienced any competitive disadvantages due to the pricing you get from your suppliers?

- ☐ 01=Yes
- ☐ 02=No
- ☐ 97=Does not apply
- ☐ 98=Don't know

G2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Minnesota?

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- ☐ 97=Nothing/None/No comments
- ☐ 98=Don't know

G3. Would you be willing to participate in a follow-up interview about any of these issues?

- ☐ 01=Yes
- ☐ 02=No

Just a few last questions.

H1. What is your name?

\_\_\_\_\_

H2. What is your position at the firm?

- ☐ 01=Owner
- ☐ 02=Principal
- ☐ 03=CEO
- ☐ 04=President
- ☐ 05=Manager
- ☐ 06=CFO

- ☐ 07=Vice President
- ☐ 08=Sales manager
- ☐ 09=Office manager
- ☐ 10=Assistant to Owner/CEO
- ☐ 88=Other (Please specify)

\_\_\_\_\_

H4. If you would like to receive information from public agencies in Minnesota, what mailing address should they use?

Street Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

ZIP: \_\_\_\_\_

H5. What fax number should they use to fax any materials to you?

\_\_\_\_\_

H5P. What phone number should they use to contact you?

\_\_\_\_\_

H6. What e-mail address should they use to get any materials to you?

\_\_\_\_\_

Thank you for your time. This is very helpful for the Department of Administration.

If you have any questions, please contact:

**Minnesota Department of Administration**  
**651-201-2455**

## APPENDIX E.

### Entry and Advancement in the Construction, Professional Services, Goods and Other Services Industries in Minnesota

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.”<sup>1</sup> Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), the study team examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Minnesota.<sup>2</sup>

One set of potential barriers to business formation are those related to entry and advancement in the construction, professional services, goods and other services industries. Appendix E examines recent data on education, employment and workplace advancement that may ultimately influence business formation in the Minnesota construction, professional services, goods and other services industries.<sup>3, 4</sup>

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

<sup>2</sup> For the purposes of the marketplace analyses in this study (Appendices E, F, G and H), the State of Minnesota market area corresponds to Minnesota as a whole, plus the two Wisconsin counties within the Minneapolis-St. Paul Metropolitan Area (Pierce and St. Croix counties). The study geography upon which the analyses are based aligns perfectly with the Minnesota component of this target geography. However, because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, the portion of the target geography located in Wisconsin must be approximated using Public Use Microdata Areas (PUMAs). Specifically, a Wisconsin PUMA is assigned to the study area if and only if the majority of that PUMA’s population resided in the two target Wisconsin counties in 2010. Further, due to a redrawing of PUMA boundaries that took place between 2011 and 2012 in response to updated data from 2010 Census, the geography underlying the 2011 portion of the 5-year ACS sample is different from that of the 2015 portion. Using this methodology and taking into account the shift in boundaries, the study team determined no Wisconsin PUMAs should be included in the 2011 portion of the sample, and one PUMA (55102) should be included starting in the 2012.

<sup>3</sup> In Appendix E and other marketplace appendices, information for “professional services” refers to Architectural, engineering and related services; Management, scientific and technical consulting services; Advertising, public relations and related services; Scientific research and development services; Computer systems design and related services; Data processing, hosting and related services; Other health care services; and Other professional, scientific and technical services. “Goods” refers to Nonmetallic mineral mining and quarrying, Industrial and miscellaneous chemicals, Cement, concrete, lime and gypsum product manufacturing; Wholesale trade; Retail trade: automobile dealers, other motor vehicle dealers, automotive parts, accessories and tire stores, furniture and home furnishings, electronics stores, building material and supplies dealers, hardware stores, lawn and garden equipment and supplies stores, pharmacies and drug stores, office supplies and stationery stores, and fuel dealers. “Other services” refers to Printing and related support activities; Truck transportation; Couriers and messengers, Employment services; Business support services; Investigation and security services; Services to buildings and dwellings; Landscaping services; Other administrative and other support services; Waste management and remediation services; Automotive repair and maintenance; Electronic and precision equipment repair and maintenance; and Commercial and industrial machinery and equipment repair and maintenance.

<sup>4</sup> Several other report appendices analyze other quantitative aspects of conditions in the Minnesota marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that the study team used in those appendices.

## Introduction

Appendix E uses data from the U.S. Census Bureau's 2011-2015 American Community Survey (ACS) to analyze education, employment and workplace advancement — all factors that may influence whether individuals from construction, professional services, goods or other services businesses. The study team examined barriers to entry into construction, professional services, goods and other services separately, because entrance requirements and opportunities for advancement differ between those industries.

**Minority workers and business owners in Minnesota.** As a starting point, the study team examined the representation of racial/ethnic minorities among workers and business owners in Minnesota based on 2011-2015 data. Figure E-1 presents demographic characteristics for the labor force as a whole and for business owners in the construction, professional services, goods and other services industries. As shown, 15 percent of Minnesota workers were racial or ethnic minorities. African Americans were 5 percent of all workers, as were Asian Americans. Hispanic Americans were 4 percent and Native Americans were 1 percent of total workers.

Examining data from the same source for the same years, Figure E-1 indicates that 9 percent of Minnesota construction, professional services, goods and other services business owners were minorities. African Americans and Asian Americans accounted for a much smaller share of business owners in these industries than what might be expected based on representation in the overall workforce. Much of the balance of Appendix E explores whether disparities in entry and advance of certain minority groups in the Minnesota construction, professional services, goods and other services industries explain these difference.

**Female workers and business owners in Minnesota.** Figure E-1 also reports the representation of women among all workers and study industry business owners in 2011 through 2015 in Minnesota. In 2011 through 2015, women accounted for 48 percent of the Minnesota labor force and 18 percent of business owners in the construction, professional services, goods and other services industries. Representation of women as employees in these specific industries is further explored in the balance of this appendix.

**Other workers and business owners in Minnesota.** In addition to minorities and females, Figure E-1 examines the representation of veterans and disabled persons among workers and study industry business owners in Minnesota.<sup>5</sup> In 2011 through 2015, 4 percent of the Minnesota workforce were persons with disabilities and 5 percent of business owners in the construction, professional services, goods and other services industries were persons with disabilities.

Veterans were 5 percent of workers across industries and 8 percent of businesses owners in the construction, professional services, goods and other services industries in 2011 through 2015.

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<sup>5</sup> The Minnesota Department of Administration and certain other entities operate a program for Targeted Group and Veteran-Owned small businesses. In addition to women and racial minorities, business owners with a substantial physical disability are eligible for certification as a Targeted Group small business. Veterans are eligible to be certified as a Veteran-Owned small business. Therefore, the study team reports data for persons with disabilities and veterans when appropriate in Appendices E, F, G and H.

The study team also examined the overlap of certain groups shown in Figure E-1 (data not shown in the table). For business owners in study industries, female-owned businesses represented relatively fewer firms owned by African Americans (13%) and Native Americans (12%) compared with non-minority-owned companies. Women accounted for nearly 40 percent of Asian American-owned firms. About 23 percent of Hispanic American-owned firms were women-owned.

About 96 percent of veteran-owned businesses were owned by non-minorities and 98 percent were owned by men. Persons with disabilities accounted for 18 percent of veteran-owned businesses, much higher than the 5 percent found overall. One-quarter of businesses owned by persons with disabilities were veteran-owned, 10 percent were women-owned and 7 percent were minority-owned.

Figure E-1.

Demographic distribution of the workforce and business owners in Minnesota, 2011-2015

| Minnesota                   | Workforce in all industries | Business owners in study industries |
|-----------------------------|-----------------------------|-------------------------------------|
| <b>Race/ethnicity</b>       |                             |                                     |
| African American            | 5.2 %                       | 2.1 %                               |
| Asian-Pacific American      | 3.7                         | 1.6                                 |
| Subcontinent Asian American | 0.9                         | 0.4                                 |
| Hispanic American           | 4.3                         | 3.8                                 |
| Native American             | 1.2                         | 1.0                                 |
| Other minority              | 0.1                         | 0.1                                 |
| Non-Hispanic white          | 84.6                        | 91.0                                |
| Total                       | 100.0 %                     | 100.0 %                             |
| <b>Gender</b>               |                             |                                     |
| Female                      | 47.9 %                      | 18.1 %                              |
| Male                        | 52.1                        | 81.9                                |
| Total                       | 100.0 %                     | 100.0 %                             |
| <b>Disability</b>           |                             |                                     |
| Persons with disabilities   | 3.9 %                       | 5.2 %                               |
| All others                  | 96.1                        | 94.8                                |
| Total                       | 100.0 %                     | 100.0 %                             |
| <b>Veteran status</b>       |                             |                                     |
| Veteran                     | 5.4 %                       | 8.3 %                               |
| Non-veteran                 | 94.6                        | 91.7                                |
| Total                       | 100.0 %                     | 100.0 %                             |

Note: For workforce in all industries, n = 148,582.

For business owners in study industries, n = 6,993.

Numbers may not add to totals due to rounding.

Source: BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

**Educational attainment.** A need for advanced education or training can be a barrier to entry or advancement in many industries. Based on 2011-2015 ACS data, Figure E-2 presents the percentage of workers age 25 or older with at least a four-year college degree in Minnesota.

**Race/ethnicity.** In Minnesota, 39 percent of all non-Hispanic white workers age 25 or older had at least a four-year degree in 2011 through 2015. For other racial/ethnic groups:

- About 23 percent of African Americans had at least a four-year college degree;
- Only 19 percent of Hispanic Americans had at least a four-year college degree; and
- About 21 percent of Native Americans had at least a four-year college degree.

About the same percentage of Asian-Pacific Americans had a four-year college degree than non-Hispanic whites, and Subcontinent Asian Americans were more likely than all other groups to be college graduates.

The Census Bureau develops the ACS results from a sample of the overall population. Therefore, small differences between groups when sample sizes are also small might not indicate real differences for the entire population. The study team performed statistical significance tests to explore whether the sample sizes were sufficient, given the magnitude of the differences, to be confident that random chance in sampling could be rejected as a cause of the difference. The double-asterisks next to each number in Figure E-2 indicates that the difference was “statistically significant at the 95 percent confidence level,” which means one could be very confident that the difference actually appears for the population, not just in the sample data. For example, one can be confident that the percentage of African Americans with college degrees (23.3%) is different from the percentage of non-Hispanic whites with college degrees (39.0%). The asterisk is shown next to African Americans since non-Hispanic whites are the reference group in Figure E-2 and the other tables in Appendix E (as are men when examining results for women).

**Gender.** In Minnesota in 2011 through 2015, a greater proportion of women than men had at least a four-year college degree.

Figure E-2.  
Percentage of all workers age 25 or older with at least a four-year degree in Minnesota, 2011-2015

Note:

\*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male gender groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                   | 2011-2015 |
|-----------------------------|-----------|
| <b>Race/ethnicity</b>       |           |
| African American            | 23.3 % ** |
| Asian-Pacific American      | 40.0      |
| Subcontinent Asian American | 88.1 **   |
| Hispanic American           | 19.1 **   |
| Native American             | 21.1 **   |
| Other minority              | 30.7      |
| Non-Hispanic white          | 39.0      |
| <b>Gender</b>               |           |
| Women                       | 40.0 % ** |
| Men                         | 35.7      |

## Construction Industry

The study team examined how education, training, employment and advancement may affect the number of businesses that individuals of different races/ethnicities owned in the construction industry in Minnesota in 2011 through 2015.

**Education.** Formal education beyond high school is not a prerequisite for most construction jobs. For that reason, the construction industry often attracts individuals who have relatively low levels of educational attainment. Most construction industry employees in Minnesota do not have a four-year college degree. Based on the 2011-2015 ACS, 49 percent of workers in the construction industry in Minnesota were high school graduates with no post-secondary education, and 6 percent had not finished high school. Only 12 percent of those working in the construction industry in Minnesota had a four-year college degree or higher, compared to 38 percent of all workers.

**Race/ethnicity.** Hispanic Americans represented an especially large pool of workers with no post-secondary education in Minnesota. As can be seen in Figure E-2, in 2011 through 2015, only 19 percent of all Hispanic American workers 25 or older in Minnesota held at least a four-year college degree, far below the figure for non-Hispanic whites working in the state (39%). The percentage of African American (23%) and Native American (21%) workers in Minnesota with a four-year college degree was also substantially lower than that of non-Hispanic whites. Based on educational requirements of entry-level jobs and the limited education beyond high school for many African Americans, Native Americans and Hispanic Americans in Minnesota, one might expect a relatively high representation of those groups in the construction industry, especially in entry-level positions.

A substantial proportion of Subcontinent Asian American workers 25 or older (88%) in Minnesota had four-year college degrees in 2011 through 2015. Given the relatively high levels of education for Subcontinent Asian Americans in the area, the representation of those groups in the construction industry in Minnesota might be similar to or lower than that of non-Hispanic whites.

**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 employer-provided training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.<sup>6</sup> Opportunities for those programs across race/ethnicity are discussed later in Appendix E.

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<sup>6</sup> Bureau of Labor Statistics, U.S. Department of Labor. 2015. "Construction Laborers and Helpers." *Occupational Outlook Handbook*. Available at: <https://www.bls.gov/ooh/construction-and-extraction/construction-laborers-and-helpers.htm#tab-4> (first accessed February 15, 2007).



**Employment.** With educational attainment as context, the study team examined the demographics of employment in the Minnesota construction industry. Figure E-3 presents data from 2011 through 2015 to compare the demographic composition of the construction industry with the total workforce in all other industries in Minnesota.

**Figure E-3.**  
Demographics of workers in construction and all non-construction industries in Minnesota, 2011-2015

Note:

\*\* Denotes that the difference in proportions between workers in the construction industry and all non-construction industries for the given ACS year is statistically significant at the 95% confidence level.

For non-construction industries, n = 138,266.

For construction industry, n = 10,316.

Due to small sample sizes, Asian-Pacific Americans and Subcontinent Asian Americans were combined into the category "Asian American."

Numbers may not add to totals due to rounding.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Minnesota             | Non-construction industries | Construction industry |
|-----------------------|-----------------------------|-----------------------|
| <b>Race/ethnicity</b> |                             |                       |
| African American      | 5.4 %                       | 1.5 % **              |
| Asian American        | 4.8                         | 0.6 **                |
| Hispanic American     | 4.3                         | 4.9                   |
| Native American       | 1.2                         | 1.3                   |
| Other minority        | 0.1                         | 0.1                   |
| Non-Hispanic white    | 84.1                        | 91.6 **               |
| Total                 | 100.0 %                     | 100.0 %               |
| <b>Gender</b>         |                             |                       |
| Female                | 50.3 %                      | 8.3 % **              |
| Male                  | 49.7                        | 91.7 **               |
| Total                 | 100.0 %                     | 100.0 %               |

**Race/ethnicity.** Based on 2011-2015 ACS data, only 8 percent of people working in the construction industry in Minnesota were minorities. Relatively few African Americans (1.5% of construction workers) and Asian Americans (0.6% of workers) were employed in the Minnesota construction industry. (Due to small sample sizes, Asian-Pacific Americans and Subcontinent Asian Americans are studied together throughout much of this appendix.)

Hispanic Americans were 5 percent of the construction workforce, which was about the same as in other industries.

Several studies throughout the United States have argued that past race discrimination by construction unions has contributed to the low employment of minorities in construction trades.<sup>7</sup> The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination is now less prevalent in unions).

**Gender.** There were large differences between the percentage of all workers who were women and the percentage of construction workers who were women in Minnesota in 2011 through 2015.

<sup>7</sup> Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*. 19(3).

During those years, women represented 50 percent of all non-construction workers in Minnesota but only 8 percent of construction workers.

Academic research concerning the effect of race- and gender-based discrimination. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. The literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.<sup>8</sup> Research concerning highway construction projects in three major U.S. cities (Boston, Los Angeles and Oakland) identified evidence of prevailing attitudes that women do not belong in construction, and that such discrimination was worse for women of color than for white women.<sup>9</sup>

**Importance of unions to entry in the construction industry.** Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.<sup>10</sup> The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have claimed that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.<sup>11</sup> Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering into the industry.<sup>12</sup>

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be the best road for African Americans and other underrepresented groups into the industry. However, some researchers have identified racial discrimination by trade unions that have historically prevented minorities from obtaining employment in skilled trades.<sup>13</sup>

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<sup>8</sup> See, for example, Erickson, Julia A and Donna E. Palladino. 2009. "Women Pursuing Careers in Trades and Construction." *Journal of Career Development*. 36(1): 68-89.

<sup>9</sup> Note that those interviews took place between 1996 and 1999. Price, Vivian, 2002. "Race, Affirmative Action and Women's Participation in U.S. Highway Construction." *Feminist Economics*. 8(2): 87-113.

<sup>10</sup> Applebaum, Herbert. 1999. *Construction Workers, U.S.A.* Westport: Greenwood Press.

<sup>11</sup> Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*. 19(3).

<sup>12</sup> Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41(4): 562-584.

<sup>13</sup> U.S. Department of Justice. 1996. *Proposed Reforms to Affirmative Action in Federal Procurement*. 61 FR 26042.

Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.<sup>14</sup>
- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.<sup>15</sup>
- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.<sup>16</sup>
- Traditionally, white unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.<sup>17</sup>
- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.<sup>18</sup>
- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.<sup>19</sup>

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<sup>14</sup> *Ibid.* See *United States v. Iron Workers Local 86* (1971), *Sims v. Sheet Metal Workers International Association* (1973), and *United States v. International Association of Bridge, Structural and Ornamental Iron Workers* (1971).

<sup>15</sup> Applebaum. 1999. Construction Workers, U.S.A.

<sup>16</sup> *Ibid.* 299. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

<sup>17</sup> Waldinger and Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction."

<sup>18</sup> U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042. See *United Steelworkers of America v. Weber* (1979) and *Taylor v. United States Department of Labor* (1982).

<sup>19</sup> Feagin and Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41(4): 562-584.

However, more recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males:

- Glover and Bilginsoy (2005) analyzed apprenticeship programs in the U.S. construction industry during the period 1996 through 2003. Their dataset covered 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.<sup>20</sup>
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik (2006) found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.<sup>21</sup>
- A recent study on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.<sup>22</sup> Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Other data also indicate a more productive relationship between unions and minority workers than that which may have prevailed in the past. For example, 2012 Current Population Survey (CPS) data indicate that the percentage of African American workers who were union members was slightly higher than for non-Hispanic whites.<sup>23</sup> The CPS asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed rates union membership to be 13 percent for African American workers, 10 percent for Hispanic American workers and 11 percent for non-Hispanic white workers. In the construction industry, the rates union membership for both African American workers and non-Hispanic white workers was 17 percent, but the rate for Hispanic construction workers was only 8 percent.

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<sup>20</sup> Glover, Robert and Cihan Bilginsoy. 2005. “Registered Apprenticeship Training in the U.S. Construction Industry.” *Education & Training*. 47(4/5): 337.

<sup>21</sup> Berik, Günseli and Cihan Bilginsoy. 2006. “Still a wedge in the door: women training for the construction trades in the USA.” *International Journal of Manpower*. 27(4): 321-341.

<sup>22</sup> Bilginsoy, Cihan. 2005. “How Unions Affect Minority Representation in Building Trades Apprenticeship Programs.” *Journal of Labor Research*. 57(1).

<sup>23</sup> 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

Although union membership and union program participation varies based on race/ethnicity, the causes of those differences and their effects on construction industry employment are unresolved. Research is especially limited on the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Minnesota are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups.

**Advancement.** To research opportunities for advancement in the Minnesota construction industry, the study team examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.<sup>24</sup> Appendix I provides full descriptions of construction trades with large enough samples in the 2011-2015 ACS for the study team to analyze.

**Racial/ethnic composition of construction occupations.** Figure E-4 presents the race/ethnicity of workers in select construction-related occupations in Minnesota, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians) and supervisory roles. Figure E-4 presents those data for 2011 through 2015.

Based on 2011-2015 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in Minnesota. Overall, minorities comprised 8 percent of the construction industry workforce in 2011 through 2015. Minorities comprised a relatively large percentage of laborers working as:

- Roofers (43%);
- Painters (27%); and
- Drywall installers (24%).

Some occupations had relatively low representations of minorities:

- Sheet metal workers (0% based on sample data);
- Brick masons (1%);
- Electricians (3%);
- Pipe layers (4%);
- Machine operators (4%); and
- Supervisors (4%).

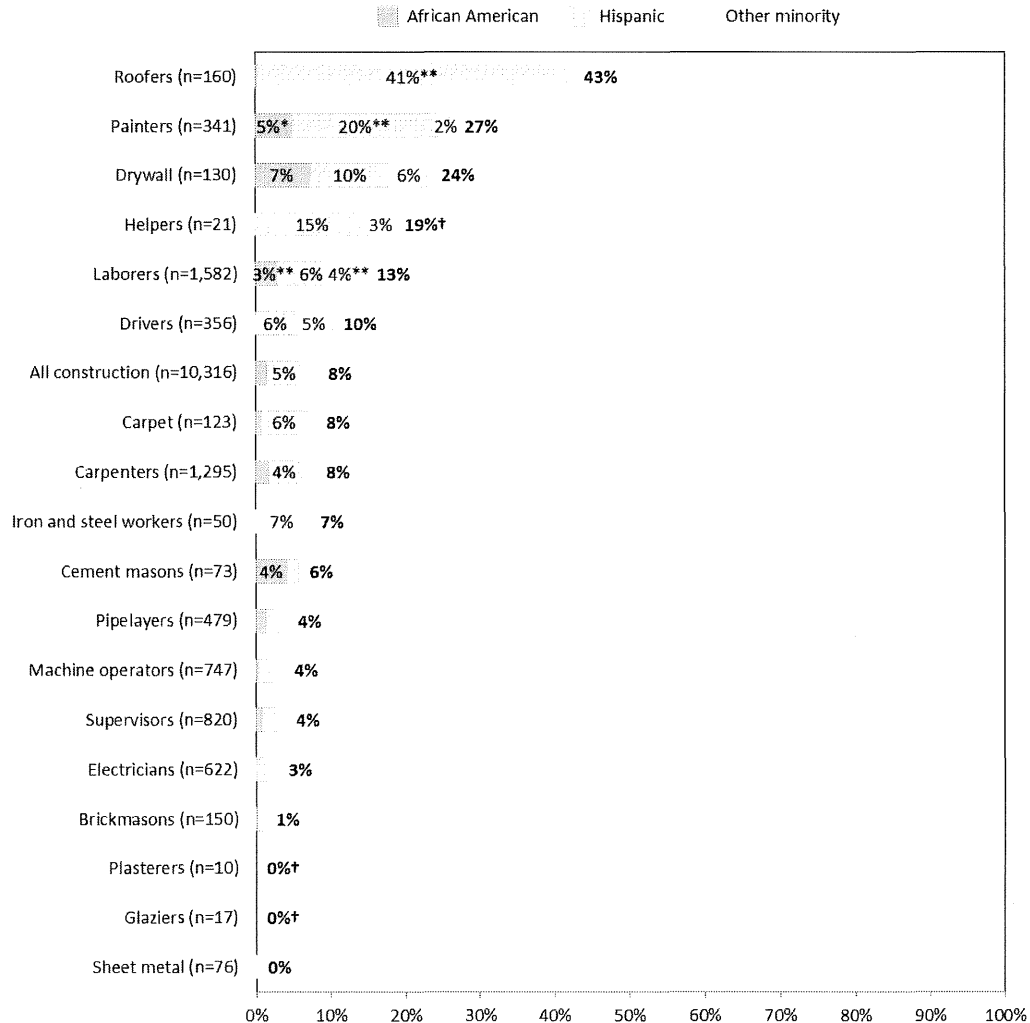
Most minorities working in the Minnesota construction industry in 2011 through 2015 were Hispanic Americans. The representation of Hispanic Americans was substantially larger among roofers (41%) and painters (20%). Those trades tend to be lower-skill occupations within construction. In contrast, in occupations such as electricians, machine operators and supervisors, Hispanic Americans were

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<sup>24</sup> Bureau of Labor Statistics, U.S. Department of Labor. 2001. "Standard Occupational Classification Major Groups." [http://www.bls.gov/soc/soc\\_majo.htm](http://www.bls.gov/soc/soc_majo.htm) (accessed February 15, 2007).

2 percent or less of Minnesota workers. The representation of African Americans in the construction industry was not more than 5 percent for any occupation analyzed.

**Figure E-4.**  
Minorities as a percentage of selected construction occupations in Minnesota, 2011-2015



**Note:** \*\* Denotes that the difference in proportions between workers in the construction industry overall and specified construction occupations at the 95% confidence level.

† Denotes that sample sizes did not reach the minimum required (25 per group) to qualify for significance testing, and therefore significance tests were not conducted for those groups.

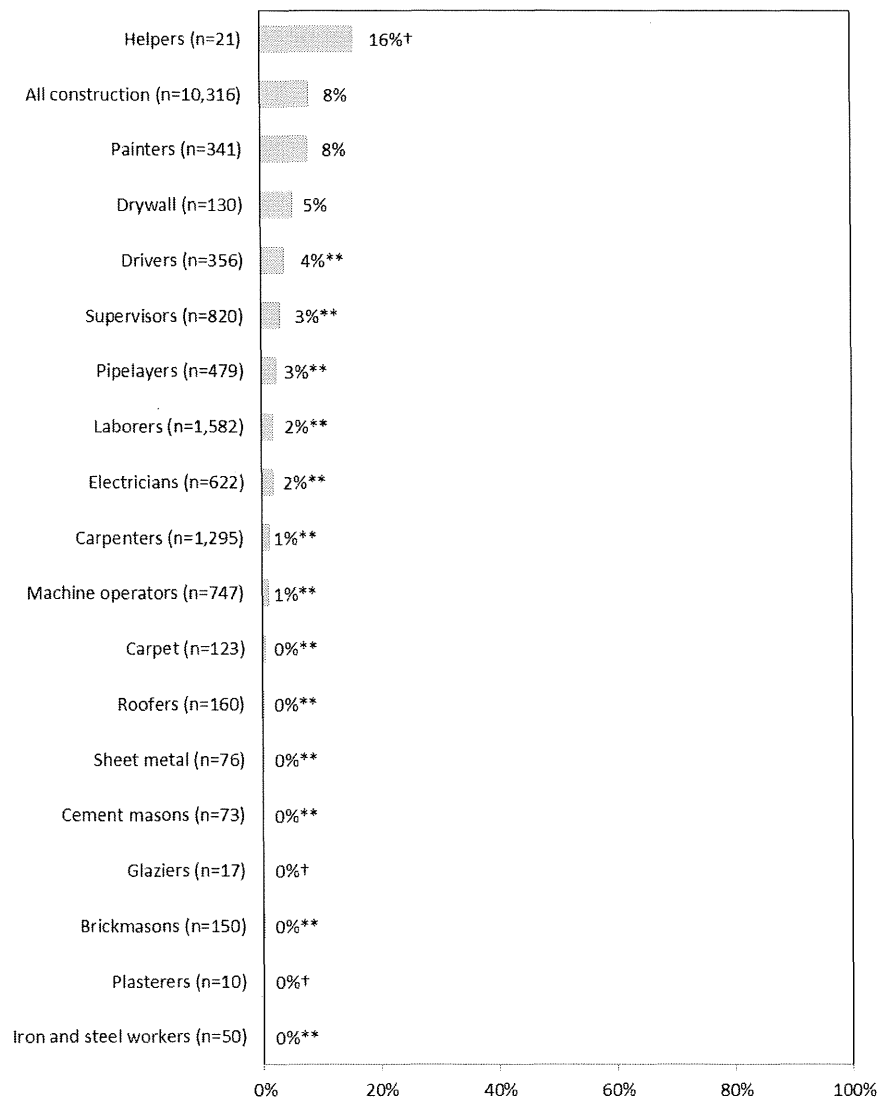
Crane and tower operators, dredge, excavating and loading machine, and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Percentages below 3 percent were not presented numerically for individual racial groups.

Source: BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender composition of construction occupations. Figure E-5 examines the share of specific construction jobs in Minnesota held by women. Overall, women were 8 percent of workers in the industry, but the share of workers who were women was much lower for most construction trades. And, the proportion of first-line supervisors who were women was 3 percent in 2011 through 2015.

Figure E-5.  
Women as a percentage of selected construction occupations in Minnesota, 2011-2015



Note: \*\* Denotes that the difference in proportions between workers in the construction industry overall and specified construction occupations at the 95% confidence level.  
† Denotes that sample sizes did not reach the minimum required (25 per group) to qualify for significance testing, and therefore significance tests were not conducted for those groups.

Crane and tower operators, dredge, excavating and loading machine, and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Percentage of minorities and women who are managers.** To further assess advancement opportunities for minorities and women in the Minnesota construction industry, the study team examined the proportion of construction workers who reported being managers. Figure E-6 presents the results for Minnesota for 2011 through 2015 by racial/ethnic and gender group.

- About 6 percent of non-Hispanic whites in the Minnesota construction industry were managers.
- Compared with non-Hispanic whites, a smaller percentage of Native Americans (2%) and Hispanic Americans (0.3%) were managers (statistically significant differences).
- Relatively fewer African Americans were managers based on ACS data, but the sample size was too small for the result to be statistically significant.

Female and male construction workers in Minnesota were nearly equally likely to be managers.

**Figure E-6.**  
Percentage of construction workers who worked as a manager in Minnesota, 2011-2015

Note:

\*\* Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Due to small sample sizes, Asian-Pacific Americans and Subcontinent Asian Americans were combined into the category "Asian American."

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota              | 2011-2015    |
|------------------------|--------------|
| <b>Race/ethnicity</b>  |              |
| African American       | 3.5 %        |
| Asian American         | 6.8 %        |
| Hispanic American      | 0.3 % **     |
| Native American        | 2.0 % **     |
| Non-Hispanic white     | 5.8 %        |
| <b>Gender</b>          |              |
| Female                 | 4.1 %        |
| Male                   | 5.6 %        |
| <b>All individuals</b> | <b>5.4 %</b> |

## Professional Services Industry

The study team also examined how education and employment may potentially influence the number of minority and female entrepreneurs working in the Minnesota professional services industry.

**Education.** In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the professional services industry because many occupations require at least a four-year college degree and some require licensure. According to the 2011-2015 ACS, 66 percent of individuals age 25 and older and working in the Minnesota professional services industry had at least a four-year college degree. Therefore, barriers to education can restrict employment opportunities and advancement opportunities and, ultimately, business ownership. Any disparities in business ownership rates in professional services-related work could have resulted from the lack of sufficient education for particular race/ethnicity and gender groups.<sup>25</sup>

<sup>25</sup> Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 42(4): 562-584.



Racial and ethnic minorities comprised 11.5 percent of workers with a four-year college degree in Minnesota, less than the 15 percent representation among all workers (based on 2011-2015 ACS data for workers ages 25+ as presented in Figure E-1). This is because relatively fewer African Americans, Hispanic Americans and Native Americans in Minnesota have college degrees than non-Hispanic whites (see Figure E-2). Therefore, the level of education necessary to work in the professional services industry may partially restrict employment opportunities for African Americans, Hispanic Americans and Native Americans.

In Minnesota, more female than male workers have a four-year college degree (see Figure E-2).

**Employment.** The first column in Figure E-7 shows the percentage of the college-educated workforce in Minnesota in 2011-2015 (ages 25+) that were racial and ethnic minorities (top of the table) or were women (bottom of the table). The second column examines the composition of the workforce in the Minnesota professional services industry, as defined for this study, among people 25 and older with a college degree. Among the college-educated employees in the professional services industry, the share that were African Americans (2.1%) and women (38%) was less than what one might expect given representation of African Americans and women among all workers 25 and older with college degrees (2.9% and 50%, respectively).

There were more Subcontinent Asian Americans working in the Minnesota professional services industry than one might expect based on composition of the college-educated workforce in the state.

**Figure E-7.**  
Demographic distribution of workers in professional services and all industries age 25 or older with a four-year college degree in Minnesota, 2011-2015.

Note:

For workers 25+ with college degree, n = 41,587.

For professional services workforce, n = 3,407.

\*\* Denotes that the difference in proportions between professional services workers and workers age 25+ in all industry groups for the given Census/ACS year is statistically significant at the 95% confidence level.

Numbers may not add to totals due to rounding.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                   | Workers 25+ with college degree | Professional services workforce |
|-----------------------------|---------------------------------|---------------------------------|
| <b>Race/ethnicity</b>       |                                 |                                 |
| African American            | 2.9 %                           | 2.1 % **                        |
| Asian-Pacific American      | 3.7                             | 4.0                             |
| Subcontinent Asian American | 2.2                             | 7.3 **                          |
| Hispanic American           | 2.0                             | 1.6                             |
| Native American             | 0.7                             | 0.5                             |
| Other minority              | 0.1                             | 0.1                             |
| Total minority              | 11.5 %                          | 15.7 %                          |
| Non-Hispanic white          | 88.5                            | 84.3 **                         |
| Total                       | 100.0 %                         | 100.0 %                         |
| <b>Gender</b>               |                                 |                                 |
| Female                      | 50.3 %                          | 38.4 % **                       |
| Male                        | 49.7                            | 61.6 **                         |
| Total                       | 100.0 %                         | 100.0 %                         |

## Goods Industry

The study team also examined how employment of minorities and women working in the goods industry in Minnesota.

Figure E-8 compares the demographic composition of the goods industry with the total workforce in all other industries in Minnesota. Based on these 2011-2015 ACS data, 10 percent of people working in the goods industry in Minnesota were minorities, less than the 16 percent found for other industries. Representation of each minority group was lower in the goods industry than in Minnesota overall.

In Minnesota, women were one-half of the workforce, but less than one-third of goods industry workers in 2011-2015 were female.

**Figure E-8.**  
Demographics of workers in goods and all non-goods industries in Minnesota, 2011-2015

Note:

For non-goods industries, n = 138,601.  
For goods industry, n = 9,981.

\*\* Denotes that the difference in proportions between workers in the goods industry and all non-goods industries for the given ACS year is statistically significant at the 95% confidence level.

Numbers may not add to totals due to rounding.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Minnesota                   | Non-goods industries | Goods industry |
|-----------------------------|----------------------|----------------|
| <b>Race/ethnicity</b>       |                      |                |
| African American            | 5.3 %                | 3.5 % **       |
| Asian-Pacific American      | 3.8                  | 2.6 **         |
| Subcontinent Asian American | 0.9                  | 0.4 **         |
| Hispanic American           | 4.4                  | 3.0 **         |
| Native American             | 1.3                  | 0.5 **         |
| Other minority              | 0.1                  | 0.2            |
| Non-Hispanic white          | 84.2                 | 89.7 **        |
| Total                       | 100.0 %              | 100.0 %        |
| <b>Gender</b>               |                      |                |
| Female                      | 49.0 %               | 31.2 % **      |
| Male                        | 51.0                 | 68.8 **        |
| Total                       | 100.0 %              | 100.0 %        |

## Other Services Industry

The fourth industry the study team examined was the Minnesota other services industry. ("Other services" refers to a broad range of business support, administrative, repair, maintenance and transportation activities.)

Racial and ethnic minorities comprised 20 percent of the other services workforce in 2011-2015 (see the second column of Figure E-9). This was more than found for other industries combined (first column of Figure E-9).

There were more African Americans and Hispanic Americans working in the other services industry than might be expected from representation in the state-wide workforce. There were relatively fewer Subcontinent Asian Americans working in the other services industry than in other industries.

Less than 30 percent of workers in the other services industry were women in 2011-2015, substantially below the representation of women in the Minnesota workforce.

Figure E-9.  
Demographics of workers in other services and all non-other services industries in Minnesota, 2011-2015

**Note:**

For all other industries, n = 138,365.

For other services industry, n = 10,217.

\*\* Denotes that the difference in proportions between workers in the other services industry and all non-other services industry for the given ACS year is statistically significant at the 95% confidence level.

Numbers may not add to totals due to rounding.

**Source:**

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                   | All other industries | Other services industry |
|-----------------------------|----------------------|-------------------------|
| <b>Race/ethnicity</b>       |                      |                         |
| African American            | 5.0 %                | 7.3 % **                |
| Asian-Pacific American      | 3.7                  | 3.4                     |
| Subcontinent Asian American | 0.9                  | 0.5 **                  |
| Hispanic American           | 4.1                  | 7.5 **                  |
| Native American             | 1.3                  | 1.0                     |
| Other minority              | 0.1                  | 0.2                     |
| Non-Hispanic white          | 84.9                 | 80.1 **                 |
| Total                       | 100.0 %              | 100.0 %                 |
| <b>Gender</b>               |                      |                         |
| Female                      | 49.4 %               | 28.2 % **               |
| Male                        | 50.6                 | 71.8 **                 |
| Total                       | 100.0 %              | 100.0 %                 |

## Summary

Racial and ethnic minorities account for 15 percent of the state workforce. Women are nearly one-half of Minnesota workers (48%). Opportunities for employment do not appear to be equal across industries in the state, however. The study team's analyses suggest that there are barriers to entry for certain minority groups and for women in the construction, professional services, goods and other services industries in Minnesota.

**Construction industry.** The Minnesota construction workforce was 92 percent non-minority and 92 percent male, by far the lowest representation of minorities and women of any of the four industries examined in Appendix E.

Far fewer African Americans and Asian Americans worked in the Minnesota construction industry than what might be expected based on their representation in the overall workforce. African Americans were just 1.5 percent of the construction workforce compared with more than 5 percent in other industries. Asian Americans were 0.6 percent of the construction workforce compared with 4.8 percent in other industries. Employment of Hispanic Americans in the construction industry was about the same as for other industries combined, so there is no evidence that opportunities for certain minority groups were limited by high representation of another minority group.

Within the construction industry, employment in certain construction trades appears to be almost entirely white, and less than 4 percent of employees were minorities in large trades such as electricians and machine operators. Among the nearly 20 construction trades examined in this study, representation of minorities only reached that of other industries in the roofing, painting and drywall trades.

Women were 8 percent of people working in the Minnesota construction industry, but broken down by trade, most occupations appear to be at least 96 percent male. There were eight trades examined in this study in which there were no women among the 659 employees in the ACS sample data (see Figure E-5).

And, once a person of color or woman enters the Minnesota construction industry, data also suggest unequal opportunities for advancement.<sup>26</sup>

It appears that there is not a level playing field for minorities and women regarding entry and advancement as employees in the Minnesota construction industry. This may also reduce the number of minorities and women who are potential entrepreneurs in this industry. Therefore, there is evidence of past race and gender discrimination regarding employment in the Minnesota construction industry that negatively affects the number of minority- and women-owned businesses in this industry.

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<sup>26</sup> In 2012-2015, 8 percent of workers in the construction industry were minorities but only 4 percent of supervisors were minorities. Women held 8 percent of jobs in the industry but only 3 percent of supervisor jobs. There appeared to be lower rates of reaching a manager position for African Americans, Hispanic Americans and Native Americans. Although the rate was lower for women compared with men, the difference was not statistically significant.

**Professional services industry.** Employment in the Minnesota professional services industry (as defined in this study) was 84 percent non-Hispanic white workers and 62 percent men in 2011-2015. Because two-thirds of workers in this industry had a four-year college degree, lack of college education appears to be a barrier to entry for certain groups. African Americans, Hispanic Americans and Native Americans were less likely to have a four-year college degree compared to non-Hispanic whites and accounted for small shares of the professional services industry workforce.

Even so, fewer African Americans worked in the Minnesota professional services industry than what might be expected based on representation among workers 25 or older with a college degree. In 2011-2015, African Americans were 2.1 percent of the professional services industry workforce compared with 2.9 percent of all workers with a college degree (among workers age 25 and older).

Employment of women in the professional services industry in Minnesota was substantially below what might be expected from the relative number of women with college degrees.

Beyond the educational barriers, and other barriers to employment for African Americans in the professional services industry might negatively affect the number of African American-owned professional services firms in the state. The data also suggest unequal employment opportunities for women in this industry, which could depress the number of women-owned professional services firms in Minnesota.

**Goods industry.** Employment in the Minnesota goods industry was 90 percent non-Hispanic white and 69 percent male. Fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans worked in the Minnesota goods industry than what might be expected based on their representation in the overall workforce. There is evidence that race and gender affect employment opportunities in the goods industry in Minnesota. There might be fewer minority- and women-owned firms in this industry as a result.

**Other services industry.** The study team examined jobs for a broad range of businesses within the “other services” industry. Non-minorities were 80 percent of the workforce in this industry in 2011-2015, and 72 percent of workers were men. Representation of minorities was higher in the other services industry than in other industries in the state, particularly for African Americans and Hispanic Americans. Employment of women, however, was much lower than in other industries. The data suggest gender-based barriers to employment in this industry. There might be fewer women-owned businesses in the other services industry in Minnesota than if there were more representation of women in the industry.

**Persons with disabilities and veterans.** At the outset of Appendix E, the study team examined employment of persons with disabilities and veterans based on ACS data for 2011 through 2015. Persons with disabilities were 4 percent of workers in Minnesota. Veterans were 5 percent of workers across industries in Minnesota.

## APPENDIX F.

### Business Ownership in the Construction, Professional Services, Goods and Other Services Industries in Minnesota

One in four construction workers in Minnesota was a self-employed business owner in 2011 through 2015.<sup>1</sup> One in six workers in the state professional services industry and the other services industry was a self-employed business owner. For the statewide goods industry, about one in twelve workers was a self-employed business owner.<sup>2</sup>

Focusing on those four industries, the study team examined business ownership for different racial, ethnic and gender groups; persons with and without a disability; and veterans and non-veterans in the study area. The study team used Public Use Microdata Samples (PUMS) from the 2011 through 2015 American Community Survey (ACS) to study business ownership rates in the construction, professional services, goods and other services industries. Note that “self-employment” and “business ownership” are used interchangeably in Appendix F.

#### Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level.<sup>3</sup> Although overall self-employment rates have increased for minorities and women

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<sup>1</sup> For the purposes of the marketplace analyses in this study (Appendices E, F, G and H), the Minnesota market area corresponds to Minnesota as a whole, plus the two Wisconsin counties within the Minneapolis-St. Paul Metropolitan Area (Pierce and St. Croix counties). The study geography upon which the analyses are based aligns perfectly with the Minnesota component of this target geography. However, because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, the portion of the target geography located in Wisconsin must be approximated using Public Use Microdata Areas (PUMAs). Specifically, a Wisconsin PUMA is assigned to the study area if and only if the majority of that PUMA’s population resided in the two target Wisconsin counties in 2010. Further, due to a redrawing of PUMA boundaries that took place between 2011 and 2012 in response to updated data from 2010 Census, the geography underlying the 2011 portion of the 5-year ACS sample is different from that of the 2015 portion. Using this methodology and taking into account the shift in boundaries, the study team determined no Wisconsin PUMAs should be included in the 2011 portion of the sample, and one PUMA (55102) should be included in the 2012 portion.

<sup>2</sup> In Appendix F and other marketplace appendices, information for “professional services” refers to Architectural, engineering and related services; Management, scientific and technical consulting services; Advertising, public relations and related services; Scientific research and development services; Computer systems design and related services; Data processing, hosting and related services; Other health care services; and Other professional, scientific and technical services. “Goods” refers to Nonmetallic mineral mining and quarrying; Industrial and miscellaneous chemicals; Cement, concrete, lime and gypsum product manufacturing; Wholesale trade; Retail trade: automobile dealers, other motor vehicle dealers, automotive parts, accessories and tire stores, furniture and home furnishings, electronics stores, building material and supplies dealers, hardware stores, lawn and garden equipment and supplies stores, pharmacies and drug stores, office supplies and stationery stores, and fuel dealers. “Other services” refers to Printing and related support activities; Truck transportation; Couriers and messengers; Employment services; Business support services; Investigation and security services; Services to buildings and dwellings; Landscaping services; Other administrative and other support services; Waste management and remediation services; Automotive repair and maintenance; Electronic and precision equipment repair and maintenance; and Commercial and industrial machinery and equipment repair and maintenance.

<sup>3</sup> See, for example, Waldinger, Roger and Howard E. Aldrich. 1990. *Ethnicity and Entrepreneurship*. Annual Review of Sociology. 111-135; Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources. 31(4): 757-793; Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital*. Journal

over time, a number of 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 from state to state.

**Construction industry.** Compared with other industries, more people employed in the construction industry are business owners. Based on ACS data for 2011 through 2015, 26 percent of workers in the Minnesota construction industry were self-employed (in incorporated or unincorporated businesses) compared with only 9 percent of workers across all industries.

However, business ownership rates for minorities working in construction were lower than for non-Hispanic whites based on these data. For example, only 16 percent of Hispanic Americans in the industry were business owners in 2011-2015. The differences in self-employment rates were statistically significant for Native Americans and Hispanic Americans working in the Minnesota construction industry, but small the sample size for Asian Americans working in the industry made it difficult to find a statistically significant difference for this group. (The study team notes in the following tables when the sample size for a group is less than 25 people.) In addition, only 16 percent of women working in the construction industry in Minnesota were self-employed, compared with 27 percent of men (a statistically significant difference).

Business ownership rates for persons with disabilities who worked in construction was about the same for all others working in the industry. There was also little difference in ownership rates between veterans and non-veterans.

Figure F-1.  
Percentage of workers in the  
Minnesota construction industry  
who were self-employed,  
2011-2015

Note:

\*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups, females and males, persons with disabilities and all others, or veterans and non-veterans for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                 | Self-employment rate | Sample size   |
|---------------------------|----------------------|---------------|
| <b>Race/ethnicity</b>     |                      |               |
| African American          | 24.7 %               | 62            |
| Asian American            | 21.6 %               | 38            |
| Hispanic American         | 16.0 % **            | 220           |
| Native American           | 18.5 % **            | 167           |
| Non-Hispanic white        | 26.8 %               | 9,825         |
| <b>Gender</b>             |                      |               |
| Female                    | 16.3 % **            | 815           |
| Male                      | 27.0 %               | 9,501         |
| <b>Disability</b>         |                      |               |
| Persons with disabilities | 29.5 %               | 484           |
| All others                | 26.0 %               | 9,832         |
| <b>Veteran status</b>     |                      |               |
| Veteran                   | 26.9 %               | 879           |
| Non-veteran               | 26.1 %               | 9,437         |
| <b>All individuals</b>    | <b>26.1 %</b>        | <b>10,316</b> |

of Labor Economics. 25(2): 289-323; and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses*. Russell Sage Foundation.

**Professional services industry.** Figure F-2 presents the percentage of workers who were self-employed in the Minnesota professional services industry in 2011 through 2015.

Among non-Hispanic whites working in the industry, about 16 percent owned businesses. The business ownership rates for African Americans (7%) and Subcontinent Asian Americans (5%) were lower than that of non-Hispanic whites. The rate for women working in the industry (13%) was lower than for men (16%). Each of these differences in business ownership rates was statistically significant.

About 21 percent of persons with disabilities working in the professional services industry owned businesses, a rate higher than for others working in the industry. There was no statistically significant difference for veterans compared with non-veterans.

**Figure F-2.**  
Percentage of workers in the Minnesota professional services industry who were self-employed, 2011-2015

Note:

\*, \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups, females and males, persons with disabilities and all others, or veterans and non-veterans for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Minnesota                   | Self-employment rate | Sample size  |
|-----------------------------|----------------------|--------------|
| <b>Race/ethnicity</b>       |                      |              |
| African American            | 6.7 % **             | 165          |
| Asian-Pacific American      | 13.0 %               | 150          |
| Subcontinent Asian American | 5.0 % **             | 166          |
| Hispanic American           | 21.4 %               | 101          |
| Native American             | 25.8 %               | 54           |
| Non-Hispanic white          | 15.7 %               | 5,312        |
| <b>Gender</b>               |                      |              |
| Female                      | 12.8 % **            | 2,745        |
| Male                        | 16.5 %               | 3,208        |
| <b>Disability</b>           |                      |              |
| Persons with disabilities   | 21.1 % *             | 195          |
| All others                  | 14.7 %               | 5,758        |
| <b>Veteran status</b>       |                      |              |
| Veteran                     | 19.7 %               | 327          |
| Non-veteran                 | 14.7 %               | 5,626        |
| <b>All individuals</b>      | <b>14.9 %</b>        | <b>5,953</b> |



**Goods industry.** Based on ACS data for 2011 through 2015, 6 percent of non-Hispanic whites working in the Minnesota goods industry were business owners. The business ownership rate was much lower for African Americans (about 2%). The rate of business ownership appeared to be lower for Hispanic Americans working in the industry (4%), but this difference was not statistically significant given sample sizes for this group.

Relatively fewer women than men working in the industry owned businesses (about 4% compared with 7%).

Figure F-3.  
Percentage of workers in the  
Minnesota goods industry who  
were self-employed,  
2011-2015

Note:

\*, \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups, females and males, persons with disabilities and all others, or veterans and non-veterans for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                 | Self-employment rate | Sample size |
|---------------------------|----------------------|-------------|
| <b>Race/ethnicity</b>     |                      |             |
| African American          | 1.7 % **             | 152         |
| Asian American            | 6.0 %                | 187         |
| Hispanic American         | 4.4 %                | 169         |
| Native American           | 6.0 %                | 55          |
| Non-Hispanic white        | 6.2 %                | 9,411       |
| <b>Gender</b>             |                      |             |
| Female                    | 3.8 % **             | 2,996       |
| Male                      | 6.9 %                | 6,985       |
| <b>Disability</b>         |                      |             |
| Persons with disabilities | 10.8 % **            | 437         |
| All others                | 5.7 %                | 9,544       |
| <b>Veteran status</b>     |                      |             |
| Veteran                   | 7.8 % *              | 769         |
| Non-veteran               | 5.8 %                | 9,212       |
| <b>All individuals</b>    | 5.9 %                | 9,981       |

**Other services industry.** Among non-Hispanic whites working in the other services industry (as defined in this study), about 17 percent owned businesses. Based on data for 2011 through 2015, rates of business ownership for African Americans, Asian-Pacific Americans, Subcontinent Asian Americans and Hispanics was substantially lower than for non-Hispanic whites. The results in Figure F-4 show that:

- The business ownership rate for African Americans, Asian-Pacific Americans and Subcontinent Asian Americans were each approximately 7 percent, less than one-half the rate for non-Hispanic whites; and
- The business ownership rate for Hispanic Americans (13%) was also less than the rate for non-Hispanic whites.

The rate of business ownership for women (12%) working in the other services industry in Minnesota was less than the rate for men (17%) in 2011 through 2015.

Veterans had a higher rate of business ownership than non-veterans working in the industry (20% and 15%, respectively).

Figure F-4.  
Percentage of workers in the  
Minnesota other services industry  
who were self-employed,  
2011-2015

Note:

\*, \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups, females and males, persons with disabilities and all others, or veterans and non-veterans for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Minnesota                   | Self-employment rate | Sample size   |
|-----------------------------|----------------------|---------------|
| <b>Race/ethnicity</b>       |                      |               |
| African American            | 7.3 % **             | 344           |
| Asian-Pacific American      | 7.1 % **             | 200           |
| Subcontinent Asian American | 6.5 % **             | 25            |
| Hispanic American           | 12.8 % *             | 372           |
| Native American             | 14.5 %               | 125           |
| Non-Hispanic white          | 17.3 %               | 9,138         |
| <b>Gender</b>               |                      |               |
| Female                      | 12.4 % **            | 2,626         |
| Male                        | 17.1 %               | 7,591         |
| <b>Disability</b>           |                      |               |
| Persons with disabilities   | 16.1 %               | 575           |
| All others                  | 15.7 %               | 9,642         |
| <b>Veteran status</b>       |                      |               |
| Veteran                     | 19.8 % **            | 962           |
| Non-veteran                 | 15.4 %               | 9,255         |
| <b>All individuals</b>      | <b>15.8 %</b>        | <b>10,217</b> |

**Potential causes of differences in business ownership rates.** Researchers have examined whether there are disparities in business ownership rates after considering business owners' race- and gender-neutral personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such race- and gender-neutral factors.

- Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found a positive relationship between start-up capital and business formation, expansion and survival.<sup>4</sup> In addition, one study found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.<sup>5</sup> However, unexplained differences still exist when statistically controlling for those factors.<sup>6</sup> Access to capital is discussed in more detail in Appendix G.
- Education has a positive effect on the probability of business ownership in most industries. However, findings from multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.<sup>7</sup>
- Intergenerational links affect one's likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.<sup>8</sup>
- Time since immigration and assimilation into American society are also important determinants of self-employment, but unexplained differences in business ownership between minorities and non-minorities still exist when accounting for those factors.<sup>9</sup>

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<sup>4</sup> See Lofstrom, Magnus and Chunbei Wang. 2006. Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor); and Fairlie, Robert W. and Alicia M. Robb. 2006. Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. Russell Sage Foundation.

<sup>5</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2006. Liquidity Constraints, Household Wealth and Entrepreneurship Revisited.

<sup>6</sup> Lofstrom, Magnus and Chunbei Wang. 2006. Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor).

<sup>7</sup> See Fairlie, Robert W. and Bruce D. Meyer. 1996. Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*. 31(4): 757-793; and Butler, John Sibley and Cedric Herring. 1991. Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*. 79-94.

<sup>8</sup> See Fairlie, Robert W. and Alicia M. Robb. 2006. Race, Families and Business Success: A Comparison of African American-, Asian-, and White-Owned Businesses. Russell Sage Foundation; and Fairlie, Robert W. and Alicia M. Robb. 2007. Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*. 25(2): 289-323.

<sup>9</sup> See Fairlie, Robert W. and Bruce D. Meyer. 1996. Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*. 31(4): 757-793; and Butler, John Sibley and Cedric Herring. 1991. Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*. 79-94.

## Business Ownership Regression Analysis

Race, ethnicity and gender can affect opportunities for business ownership, even when accounting for individuals' race- and gender-neutral personal characteristics such as education, age and familial status. To further examine business ownership, the study team developed multivariate regression models to explore patterns of business ownership in Minnesota. Those models estimate the effect of race/ethnicity and gender on the probability of business ownership while statistically controlling for other factors.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity analyses. 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 engineering industries persist after statistically controlling race- and gender-neutral personal characteristics.<sup>10, 11</sup> Those studies have incorporated probit econometric models using data from the U.S. Bureau of the Census and have been among materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

The study team used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables.<sup>12</sup> Independent variables included:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, disability, marital status, number of children in the household, number of elderly people in the household and English-speaking ability;
- Indicators of educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Variables representing the race/ethnicity and gender of the individuals included in the analysis.

The dependent variable was whether an individual owned a business.

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<sup>10</sup> National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

<sup>11</sup> National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

<sup>12</sup> Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed; “0” for individuals who are not self-employed. The model enables estimation of the probability that a worker in a given estimation sample is self-employed. The study team excluded observations where the Census Bureau had imputed values for the dependent variable, business ownership.

The study team developed four models using PUMS data for Minnesota from the 2011 through 2015 ACS. The number of observations in the model was 9,516 for people working in construction, 5,551 for professional services, 9,212 for goods and 9,173 for other services.

**Construction industry.** Figure F-5 presents the coefficients from the probit model predicting business ownership among workers in the Minnesota construction industry in 2011 through 2015. Several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership:

- Older individuals were more likely to be business owners, but the oldest individuals were less likely to be business owners;
- An increase in the number of children living in the worker's household was associated with an increase in the worker's likelihood of owning a business;
- Owning a home (especially a low-value home) was associated with a decrease in the worker's likelihood of owning a business;
- Higher interest/dividend income was linked to higher likelihood of owning a business; and
- Having a disability other than categorized as solely physical or sensory was associated with a higher likelihood of business ownership.

"Female" is shown in the last row of the table (coefficient of -0.4853). The sign of the coefficient is negative, which means that women were less likely to be business owners than men. It also is shown with a double asterisk, which means that one can be confident in rejecting random chance as the cause of the result. (Results were not statistically significant for African Americans, Asian-Pacific Americans, Hispanic Americans or Native Americans working in the industry.) These results suggest that, after controlling for race- and gender-neutral factors, a statistically significant difference persisted in the rates of business ownership for women working in construction.

Figure F-5.  
Construction industry business  
ownership model, Minnesota,  
2011- 2015

Note:

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

Source:

BBC Research & Consulting from 2011-2015 ACS  
data. The raw data extract was obtained through the  
IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Variable                              | Coefficient |
|---------------------------------------|-------------|
| Constant                              | -2.6650 **  |
| Age                                   | 0.0605 **   |
| Age-squared                           | -0.0004 **  |
| Married                               | -0.0385     |
| Number of children in household       | 0.0430 **   |
| Number of people over 65 in household | 0.0457      |
| Owns home                             | -0.1781 **  |
| Home value (\$000s)                   | 0.0007 **   |
| Monthly mortgage payment (\$000s)     | 0.0170      |
| Interest and dividend income (\$000s) | 0.0043 **   |
| Income of spouse or partner (\$000s)  | 0.0003      |
| Speaks English well                   | 0.1993      |
| Disabled                              | 0.0036      |
| Less than high school education       | 0.0705      |
| Some college                          | -0.0054     |
| Four-year degree                      | 0.0486      |
| Advanced degree                       | -0.0565     |
| Hispanic American                     | -0.1656     |
| African American                      | 0.1851      |
| Asian-Pacific American                | 0.1404      |
| Native American                       | -0.2637     |
| Other minority                        | 2.2447 **   |
| Female                                | -0.4853 **  |

Based on the results of each regression model, the study team simulated the rates of business ownership for minorities and for women if race, ethnicity and gender had no effect on those rates. In other words, the study team answered the question, “What percentage of women (or another group) working in an industry would own business if they were just as likely as men, given their other personal and family characteristics?” (The study team performed this calculation only for those groups where race/ethnicity or gender was a statistically significant negative factor in business ownership.)

The table below used the results in Figure F-5 to simulate business ownership rates for non-Hispanic women working in the Minnesota construction industry if they had the same probability of self-employment as similarly situated non-Hispanic white men. The model coefficients for white men were applied to the characteristics of each non-minority woman in the sample data to predict the number of white female-owned firms if gender did not have an effect. Figure F-6 shows actual and simulated (“benchmark”) business ownership rates for non-Hispanic white female workers.

About 32 percent of women would own businesses in the Minnesota construction industry if gender did not have an impact on self-employment. However, the actual 2011 through 2015 self-employment rate for women was 16 percent, resulting in a disparity index of 50 (calculated as 16.1%/32.3% and then multiplied by 100). The index is considerably below parity (“100”) and constitutes a “substantial” disparity, as explained in Chapter 7 of this report (i.e., it is below “80”).

Figure F-6.

Comparison of actual business ownership rates to simulated rates for workers in the Minnesota construction industry, 2011-2015

| Group                     | Self-employment rate |           | Disparity index |
|---------------------------|----------------------|-----------|-----------------|
|                           | Actual               | Benchmark |                 |
| Non-Hispanic white female | 16.1 %               | 32.3 %    | 50              |

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: BBC Research & Consulting from statistical models of 2011-2015 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Professional services industry.** Figure F-7 presents the coefficients from the probit model predicting business ownership in the professional services industry in Minnesota in 2011-2015. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the professional services industry:

- For those who own a home, higher home values and higher monthly mortgage payments are associated with a higher likelihood of business ownership;
- Higher interest and dividend income was associated with a higher likelihood of owning a business;
- Income from a spouse or partner increased likelihood of owning a business;
- Having a disability other than physical or sensory was associated with a higher likelihood of business ownership; and
- Having an advanced degree was associated with a higher likelihood of business ownership.

After controlling for race- and gender-neutral factors, a statistically significant difference persisted in the rates of business ownership for Subcontinent Asian Americans and female professional services workers in Minnesota. Hispanic Americans working in the Minnesota professional services industry were more likely than others to own businesses after controlling for other factors.

**Figure F-7.**  
Professional services industry business ownership model, Minnesota, 2011-2015

Note:

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

"Speaks English well" was excluded from the analysis due to small sample size.

Source:

BBC Research & Consulting from 2011-2015 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Variable                              | Coefficient |
|---------------------------------------|-------------|
| Constant                              | -2.1391 **  |
| Age                                   | 0.0110      |
| Age-squared                           | 0.0002      |
| Married                               | 0.0579      |
| Number of children in household       | -0.0017     |
| Number of people over 65 in household | 0.1030      |
| Owns home                             | -0.1464     |
| Home value (\$000s)                   | 0.0005 **   |
| Monthly mortgage payment (\$000s)     | 0.0584 *    |
| Interest and dividend income (\$000s) | 0.0049 **   |
| Income of spouse or partner (\$000s)  | 0.0008 *    |
| Disabled                              | 0.0495      |
| Less than high school education       | -0.0761     |
| Some college                          | -0.0360     |
| Four-year degree                      | 0.1422      |
| Advanced degree                       | 0.3182 **   |
| Hispanic American                     | 0.3828 **   |
| African American                      | -0.2352     |
| Asian-Pacific American                | 0.0895      |
| Subcontinent Asian American           | -0.5024 **  |
| Native American                       | 0.4311      |
| Other minority                        | 0.6811      |
| Female                                | -0.1780 **  |



As with the construction industry, the study team simulated business ownership rates in the professional services industry for those groups showing negative and statistically significant effects of race or gender. Figure F-8 presents actual and simulated (“benchmark”) business ownership rates for Subcontinent Asian American and non-Hispanic white female workers in the local professional services industry.

Approximately 5 percent of Subcontinent Asian Americans in the Minnesota professional services industry were business owners in 2011 through 2015 (including men and women), compared with a benchmark business ownership rate of 13 percent (a disparity index of 42). Similarly, simulation results for women in 2011 through 2015 indicated a disparity. Nineteen percent of women would own businesses in the professional services industry if gender did not have an impact on self-employment. However, the actual 2011-2015 self-employment rate for women was about 14 percent (a disparity index of 71).

Figure F-8.  
Comparison of actual business ownership rates to simulated rates  
for workers in the Minnesota professional service industry, 2011-2015

| Group                       | Self-employment rate |           | Disparity index |
|-----------------------------|----------------------|-----------|-----------------|
|                             | Actual               | Benchmark |                 |
| Subcontinent Asian American | 5.3 %                | 12.7 %    | 42              |
| Non-Hispanic white female   | 13.7 %               | 19.1 %    | 71              |

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.

Source: BBC Research & Consulting from statistical models of 2011-2015 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Goods industry.** Figure F-9 presents the coefficients from the probit model predicting business ownership in the Minnesota goods industry in 2011 through 2015. The model indicates that some race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the goods industry:

- Older individuals were more likely to be business owners, but the oldest individuals were less likely to be business owners;
- Married individuals were more likely to be business owners than individuals who were not married;
- For those who owned a home, higher home values were associated with a higher likelihood of business ownership; and
- Higher interest and dividend income was associated with a higher likelihood of owning a business.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that women were less likely than their male counterparts to own goods businesses in the relevant geographic market area in 2011 through 2015.

**Figure F-9.**  
Goods industry business ownership  
model, Minnesota, 2011-2015

Note:

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

Source:

BBC Research & Consulting from 2011-2015 ACS data.  
The raw data extract was obtained through the IPUMS  
program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Variable                              | Coefficient |
|---------------------------------------|-------------|
| Constant                              | -4.1605 **  |
| Age                                   | 0.0560 **   |
| Age-squared                           | -0.0004 **  |
| Married                               | 0.1462 **   |
| Number of children in household       | -0.0189     |
| Number of people over 65 in household | 0.0061      |
| Owens home                            | 0.0096      |
| Home value (\$000s)                   | 0.0007 **   |
| Monthly mortgage payment (\$000s)     | -0.0093     |
| Interest and dividend income (\$000s) | 0.0027 **   |
| Income of spouse or partner (\$000s)  | 0.0010      |
| Speaks English well                   | 0.6433      |
| Disabled                              | 0.1913      |
| Less than high school education       | -0.0288     |
| Some college                          | -0.0041     |
| Four-year degree                      | 0.0443      |
| Advanced degree                       | -0.0087     |
| Hispanic American                     | 0.3086      |
| African American                      | -0.1562     |
| Asian-Pacific American                | 0.1964      |
| Subcontinent Asian American           | -0.3538     |
| Native American                       | 0.2246      |
| Other minority                        | 0.1503      |
| Female                                | -0.3076 **  |

The study team simulated business ownership rates in the goods industry using the same approach it used for other industries. Figure F-10 presents actual and simulated (“benchmark”) business ownership rates for non-Hispanic white female workers in the local goods industry. About 4 percent of women in the goods industry were business owners, compared to the benchmark business ownership rate of 7 percent (a disparity index of 60).

**Figure F-10.**  
Comparison of actual business ownership rates to simulated rates  
for workers in the Minnesota goods industry, 2011-2015

| Group                     | Self-employment rate |           | Disparity index |
|---------------------------|----------------------|-----------|-----------------|
|                           | Actual               | Benchmark |                 |
| Non-Hispanic white female | 3.9 %                | 6.5 %     | 60              |

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.

Source: BBC Research & Consulting from statistical models of 2011-2015 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Other services industry.** Figure F-11 presents the coefficients from the probit model predicting business ownership in the other services industry in the relevant geographic market area in 2011 through 2015. The model indicates that several race- and gender-neutral factors were important and statistically significant in predicting the probability of business ownership in the other services industry:

- Married individuals were more likely to be business owners than individuals that were not married;
- An increase in the number of children living in the worker's household was associated with an increase in the worker's likelihood of owning a business;
- For those who owned a home, higher home values were associated with a higher likelihood of business ownership;
- Higher interest and dividend income was associated with a higher likelihood of owning a business;
- Individuals who could speak English well were more likely to be business owners than those who could not; and
- Having a college education was associated with a lower likelihood of owning a business.

After statistically controlling for race- and gender-neutral factors, the regression model indicated that African Americans, Asian-Pacific Americans and non-Hispanic white females were less likely to own other services businesses in Minnesota in 2011 through 2015.

Figure F-11.  
Other services industry business  
ownership model, Minnesota,  
2011-2015

Note:

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

Source:

BBC Research & Consulting from 2011-2015 ACS  
data. The raw data extract was obtained through the  
IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

| Variable                              | Coefficient |
|---------------------------------------|-------------|
| Constant                              | -2.3794 **  |
| Age                                   | 0.0158      |
| Age-squared                           | 0.0000      |
| Married                               | 0.1569 **   |
| Number of children in household       | 0.0380 *    |
| Number of people over 65 in household | -0.0388     |
| Owns home                             | 0.0709      |
| Home value (\$000s)                   | 0.0007 **   |
| Monthly mortgage payment (\$000s)     | -0.0233     |
| Interest and dividend income (\$000s) | 0.0050 **   |
| Income of spouse or partner (\$000s)  | 0.0007      |
| Speaks English well                   | 0.5004 *    |
| Disabled                              | 0.0104      |
| Less than high school education       | -0.0432     |
| Some college                          | -0.1125 **  |
| Four-year degree                      | -0.2255 **  |
| Advanced degree                       | 0.1120      |
| Hispanic American                     | 0.1853      |
| African American                      | -0.2989 **  |
| Asian-Pacific American                | -0.3814 *   |
| Subcontinent Asian American           | -0.3424     |
| Native American                       | 0.1118      |
| Other minority                        | -1.4635 **  |
| Female                                | -0.2157 **  |

As shown in Figure F-12, 7 percent of African Americans in the other services industry were business owners compared to the benchmark business ownership rate of 13 percent (a disparity index of 53). Similar disparities are evident for Asian-Pacific Americans (disparity index of 40) and for non-Hispanic white women (disparity index of 77).

Figure F-12.  
Comparison of actual business ownership rates to simulated rates  
for workers in the Minnesota other services industry, 2011-2015

| Group                     | Self-employment rate |           | Disparity index |
|---------------------------|----------------------|-----------|-----------------|
|                           | Actual               | Benchmark |                 |
| African American          | 6.9 %                | 13.1 %    | 53              |
| Asian-Pacific American    | 5.8 %                | 14.3 %    | 40              |
| Non-Hispanic white female | 13.9 %               | 18.0 %    | 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-4.

Source: BBC Research & Consulting from statistical models of 2011-2015 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

## Summary

In each of the four industries, there was evidence of disparities in business ownership for some of the groups examined. These results are based on 2011-2015 ACS data for Minnesota.

In construction:

- Business ownership rates for Hispanic Americans and Native Americans were substantially lower than that of non-Hispanic whites.
- Business ownership rates for women were substantially lower than that of men. After statistically controlling for a number of race- and gender-neutral factors, about one-half as many women owned businesses than similarly situated men.

In the professional services industry:

- Business ownership rates for African Americans and Subcontinent Asian Americans were substantially lower than that of non-Hispanic whites.
- Business ownership rates for women were substantially lower than that of men.
- After statistically accounting for race- and gender-neutral factors, there were still substantial disparities for Subcontinent Asian Americans and women.

In the goods industry:

- Business ownership rates for African Americans and females were substantially lower than non-minorities and males.
- After statistically controlling for a number of race- and gender-neutral factors, substantially fewer women owned businesses than similarly situated men.

In the other services industry:

- Business ownership rates for African Americans, Asian-Pacific Americans, Subcontinent Asian Americans and Hispanic Americans were substantially lower than that of non-minorities.
- Business ownership rates for females were substantially lower than that of males.
- After statistically controlling for a number of neutral factors, substantially fewer African Americans, Asian-Pacific Americans and women owned businesses than similarly situated non-minorities and men.

There was also evidence of substantially lower business ownership rates for certain minority groups in certain industries that are not mentioned above. Small sample sizes for workers in those groups made it difficult to find statistically significant differences.

Among persons with disabilities and veterans working in the Minnesota construction, professional services, goods and other services industries, rates of business ownership were similar to other groups, or were higher.

## APPENDIX G.

### Access to Capital for Business Formation and Success in Minnesota

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.<sup>1, 2</sup> Researchers have also found that the amount of start-up capital can affect long-term business success and, on average, minority- and women-owned businesses appear to have less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.<sup>3</sup> For example:

- In 2007, 30 percent of majority-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had start-up capital of \$25,000 or more.<sup>4</sup>
- Only 17 percent of African American-owned businesses indicated a comparable amount of start-up capital, and disparities in start-up capital were identified for every other minority group except Asian Americans.
- Nineteen percent of female-owned businesses reported start-up capital of \$25,000 or more compared with 32 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Race- or gender-based discrimination in start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.<sup>5</sup> Therefore, any discrimination in the traditional means to obtain start-up capital (equity in a home and the ability to borrow against that equity) could also have long-term impacts on business ownership and success. Housing discrimination and discrimination in mortgage lending decades ago could have lasting effects today for these current or potential business owners.

Appendix G presents information about homeownership and mortgage lending, because home equity is often an important source of capital to start and expand businesses. BBC Research & Consulting and Keen Independent Research collaborated in performing the analyses presented in Appendix G.

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<sup>1</sup> For example, see Mitchell, Karlyn and Douglas K. Pearce. 2005. "Availability of Financing to Small Firms Using the Survey of Small Business Finances." U.S. Small Business Administration, Office of Advocacy. 57.

<sup>2</sup> Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

<sup>3</sup> *Ibid.*

<sup>4</sup> Business owners were asked, "What was the total amount of capital used to start or acquire this business? (Capital includes savings, other assets, and borrowed funds of owner(s))." From U.S. Census Bureau, Statistics for All U.S. Firms by Total Amount of Capital Used to Start or Acquire the Business by Industry, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2007 Survey of Business Owners:  
[http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2007\\_00CSCB16&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table).

<sup>5</sup> Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

## Homeownership and Mortgage Lending

The study team analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

**Homeownership.** Wealth created through homeownership can be an important source of capital to start or expand a business.<sup>6</sup> In sum:

- A home is a tangible asset that provides borrowing power;<sup>7</sup>
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;<sup>8</sup>
- Next to business loans, mortgage loans have traditionally been the second largest loan type for small businesses;<sup>9</sup> and
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses.<sup>10</sup>

Barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. The study team analyzed homeownership rates and home values before considering loan denial and subprime lending.

**Homeownership rates.** Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.<sup>11</sup> For example, in the past, a woman's participation in homeownership was secondary to that of her husband and parents.<sup>12</sup> The study team used 2011-2015 American Community Survey (ACS) data to examine homeownership rates in Minnesota.<sup>13</sup> Figure G-1 presents homeownership rates for minority groups, non-Hispanic whites, persons with disabilities and veterans.<sup>14</sup>

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<sup>6</sup> The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

<sup>7</sup> Nevin, Allen. 2006. "Homeownership in California: A CBIA Economic Treatise." *California Building Industry Association*. 2.

<sup>8</sup> Jackman, Mary R. and Robert W. Jackman. 1980. "Racial Inequalities in Home Ownership." *Social Forces*. 58. 1221-1234.

<sup>9</sup> Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking and Finance*. 22.

<sup>10</sup> Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth and Discrimination." *Journal of Business*. 78: 2153-2178.

<sup>11</sup> Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72: 166-170.

<sup>12</sup> Card, Emily. 1980. "Women, Housing Access, and Mortgage Credit." *Signs*. 5: 215-219.

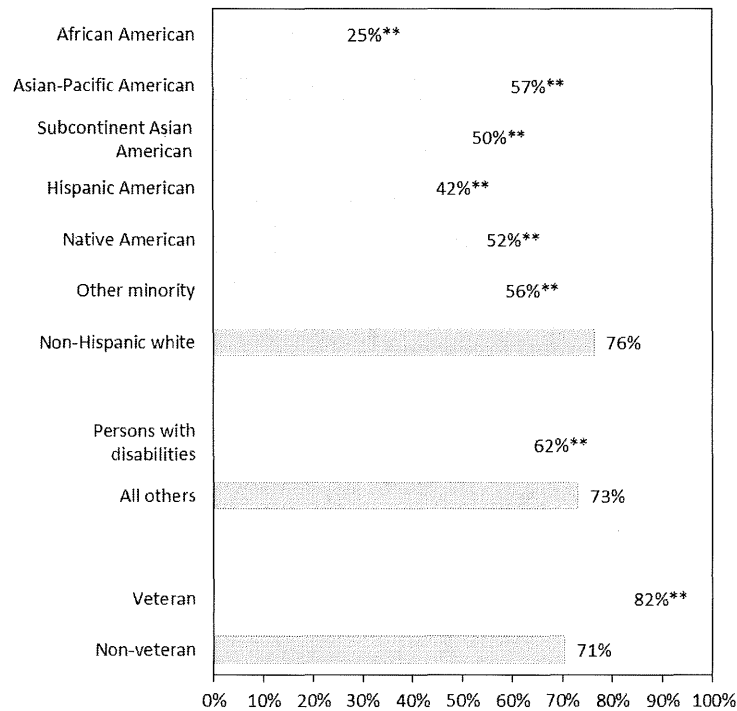
<sup>13</sup> For purposes of the marketplace analyses in this study (Appendices E, F, G and H), the Minnesota market area corresponds to Minnesota as a whole, plus the two Wisconsin counties within the Minneapolis-St. Paul Metropolitan Area (Pierce and St. Croix counties). The study geography upon which the analyses are based aligns perfectly with the Minnesota component of this target geography. However, because the Census suppresses county information in the American Community Survey (ACS) data to safeguard respondent confidentiality, the portion of the target geography located in

**Figure G-1.**  
**Percentage of**  
**Minnesota**  
**households that are**  
**homeowners, 2011-**  
**2015**

**Note:**  
**\*\* Denotes that the**  
**difference in proportions**  
**from non-Hispanic white**  
**for the given year is**  
**statistically significant at**  
**the 95% confidence level.**

The sample universe is all households.

**Source:**  
 BBC Research & Consulting  
 from 2011-2015 ACS data.  
 The raw data extract was  
 obtained through the  
 IPUMS program of the MN  
 Population Center:  
<http://usa.ipums.org/usa/>.



As shown in the figure above, about three-quarters of non-Hispanic white households in Minnesota were homeowners. Disparities in homeownership rates between racial/ethnic minorities and non-minorities were apparent in 2011 through 2015.

- One-fourth (25%) of African American households were homeowners, compared to 76 percent of non-Hispanic white households;
- About 42 percent of Hispanic American households were homeowners;
- Homeownership rates for Asian-Pacific Americans and Subcontinent Asian Americans were 57 percent and 50 percent, respectively; and
- About one-half of Native American households owned homes.

Disparities in homeownership rates were also found for persons with disabilities. Only 62 percent of persons with disabilities were homeowners, compared to 73 percent of all others. Homeownership for veterans is greater than for non-veterans.

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Wisconsin must be approximated using Public Use Microdata Areas (PUMAs). Specifically, a Wisconsin PUMA is assigned to the study area if and only if the majority of that PUMA's population resided in the two target Wisconsin counties in 2010. Further, due to a redrawing of PUMA boundaries that took place between 2011 and 2012 in response to updated data from 2010 Census, the geography underlying the 2011 portion of the 5-year ACS sample is different from that of the 2015 portion. Using this methodology and taking into account the shift in boundaries, the study team determined no Wisconsin PUMAs should be included in the 2011 sample portion, and one PUMA (55102) should be included starting in 2012.

<sup>14</sup> Minnesota Department of Administration Office of State Procurement (OSP) operates a program for Targeted Group, Economically Disadvantaged and Veteran-Owned small businesses. In addition to woman and racial minorities, business owners with a substantial physical disability are eligible for certification as a Targeted Group small business. Veterans are eligible to be certified as a Veteran-Owned small business. Therefore, veterans and persons with a disability are studied when appropriate throughout the marketplace analyses in this study (Appendices E, F, G and H).



Lower rates of homeownership may reflect lower incomes for target groups. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, an older study found that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.<sup>15</sup>

**Home values.** Research has shown homeownership and home values to be direct determinants of available capital to form or expand businesses.<sup>16</sup> Using 2011 through 2015 ACS data, the study team compared median home values by target group.

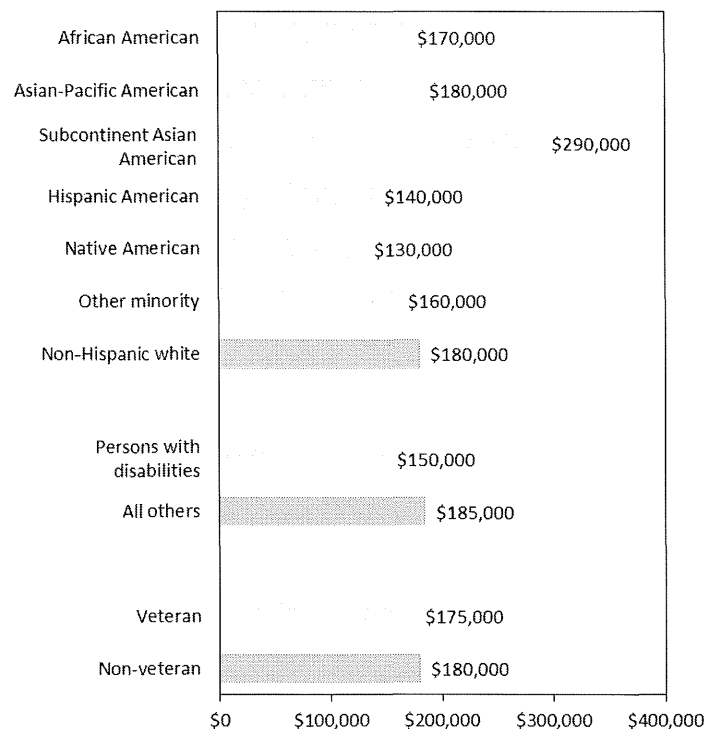
Figure G-2 presents median home values by racial/ethnic groups in Minnesota in 2011 through 2015. African Americans (\$170,000), Hispanic Americans (\$140,000) and Native Americans (\$130,000) had lower median home values than non-Hispanic whites (\$180,000) in Minnesota. On average, Asian-Pacific Americans and Subcontinent Asian Americans owned homes of equal or greater value than non-Hispanic whites.

Persons with disabilities who owned homes had a lower median home value (\$150,000) than all others (\$185,000). There was little difference in home values for veterans and non-veterans.

**Figure G-2.**  
**Median home values for**  
**Minnesota**  
**homeowners,**  
**2011-2015**

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

**Source:**  
BBC Research & Consulting from  
2011-2015 American  
Community Survey data. The  
raw data extract was obtained  
through the IPUMS program of  
the MN Population Center:  
<http://usa.ipums.org/usa/>.



<sup>15</sup> Jackman. 1980. "Racial Inequalities in Home Ownership."

<sup>16</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." IZA Discussion Paper. No. 2201.

**Mortgage lending.** Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.<sup>17</sup>

The study team explored market conditions for mortgage lending in Minnesota. 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.<sup>18</sup> Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007, 2011 and 2015. Although 2015 provides a more recent representation of the home mortgage market, the 2007 data represent a more complete data set from before the recent mortgage crisis. Many of the institutions that originated loans in 2007 were no longer in business by the 2015 reporting date for HMDA data.<sup>19</sup> For example, in 2007, applications were distributed among 8,610 lenders nationwide, while in 2014 the number of lenders had fallen to 6,913.<sup>20</sup> In addition, the percentage of government-insured loans, which the study team did not include in its analysis, increased dramatically between 2007 and 2015, decreasing the proportion of total loans that the study team analyzed in the 2015 data.<sup>21</sup>

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<sup>17</sup> Savage, Charlie. December 22, 2011. “\$335 Million Settlement on Countywide Lending Bias.” *NYTimes.com*. Available online at: <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>.

<sup>18</sup> Depository institutions were required to report 2015 HMDA data if they had assets of more than \$443 million on the preceding December 31 (\$36 million for 2007 and \$40 million for 2011), 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.

<sup>19</sup> According to an article by the Federal Reserve, the volume of reported loan applications and originations fell sharply from 2007 to 2008 after previously falling between 2006 and 2007. See Avery, Brevoort, and Canner. “The 2008 HMDA Data: The Mortgage Market during a Turbulent Year.” Available online at: <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft.pdf>.

<sup>20</sup> HMDA did not provide the number of total lenders in the 2016 press release, which describes the 2015 data, as had been done in previous years.

<sup>21</sup> Loans insured by government programs have surged since 2006. In 2006, about 10 percent of first lien home loans were insured by a government program. More than half of home loans were insured by the government in 2009. Source: “The 2009 HMDA Data: The Mortgage Market in a Time of Low Interest Rates and Economic Distress,” *Federal Reserve Bulletin*. December 2010, pp. A39-A77.

**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.<sup>22</sup> Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.<sup>23</sup>

Figure G-3 presents loan denial results for high-income households in Minnesota in 2007, 2011 and 2015. Data for 2007 show higher denial rates for all groups compared with 2015.

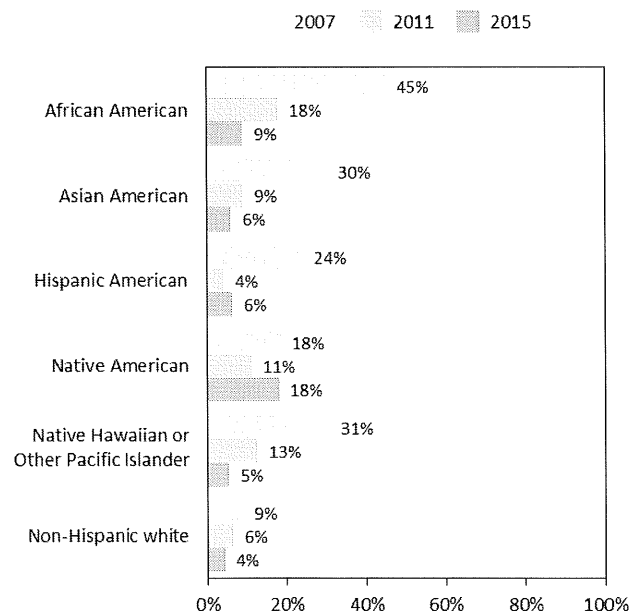
African American, Asian American, Native American and Native Hawaiian and other Pacific Islander high-income applicants faced higher loan denial rates compared with non-Hispanic white applicants in all three years (2007, 2011 and 2015).

In 2015, loan denial rates remained higher for all minority loan applicants relative to non-Hispanic white applicants. The denial rate in 2015 was particularly high among Native American high-income applicants, 18 percent of whom had their applications denied, compared to only 4 percent of non-Hispanic white applicants.

**Figure G-3.**  
Denial rates of conventional purchase loans to high-income households in Minnesota, 2007, 2011 and 2015

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

**Source:**  
FFIEC HMDA data 2007, 2011 and 2015.



<sup>22</sup> Median family income for the Minneapolis-St. Paul-Bloomington, MN-WI MSA was about \$86,000 in 2015 and \$78,000 in 2007. Likewise, median family income for the non-metro portion of Minnesota was about \$64,000 in 2015 and \$55,000 in 2007. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2007 and 2015 CRA/HMDA reports.

<sup>23</sup> For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

**Additional research.** Several national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. For example:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination.<sup>24</sup> It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.<sup>25</sup> The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.<sup>26</sup>
- Using the Federal Reserve Board's 1983 Survey of Consumer Finances and the 1980 Census of Population and Housing data, analyses revealed that minority households were one-third as likely to receive conventional loans as non-Hispanic white households after taking into account financial and demographic variables.<sup>27</sup>
- Findings from a Midwest study indicate a relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics revealed that African American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.<sup>28</sup>

**Subprime lending.** Loan denial is only one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Until recent years, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for \$330 billion of U.S. mortgages in 2003, up from \$35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.<sup>29</sup> With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.<sup>30</sup> Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

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<sup>24</sup> Munnell, Alicia H., Geoffrey Tootell, Lynn Browne and James McEneaney. 1996. "Mortgage Lending in Boston: Interpreting HMDA Data." *The American Economic Review*. 86: 25-53.

<sup>25</sup> Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives*. 12: 41-62.

<sup>26</sup> Yinger, John. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation. 71.

<sup>27</sup> Canner, Glenn B., Stuart A. Gabriel and J. Michael Woolley. 1991. "Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets." *Southern Economic Journal*. 58: 249-262.

<sup>28</sup> Leahy, Peter J. 1985. "Are Racial Factors Important for the Allocation of Mortgage Money?: A Quasi-Experimental Approach to an Aspect of Discrimination." *American Journal of Economics and Sociology*. 44: 185-196.

<sup>29</sup> Avery, Brevoort, and Canner, "The 2006 HMDA Data." Federal Reserve Bulletin, December 2007, pp. A73-A109.

<sup>30</sup> Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure." *Federal Reserve Bank of Boston*.

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 2007, 2011 and 2015.<sup>31</sup> Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

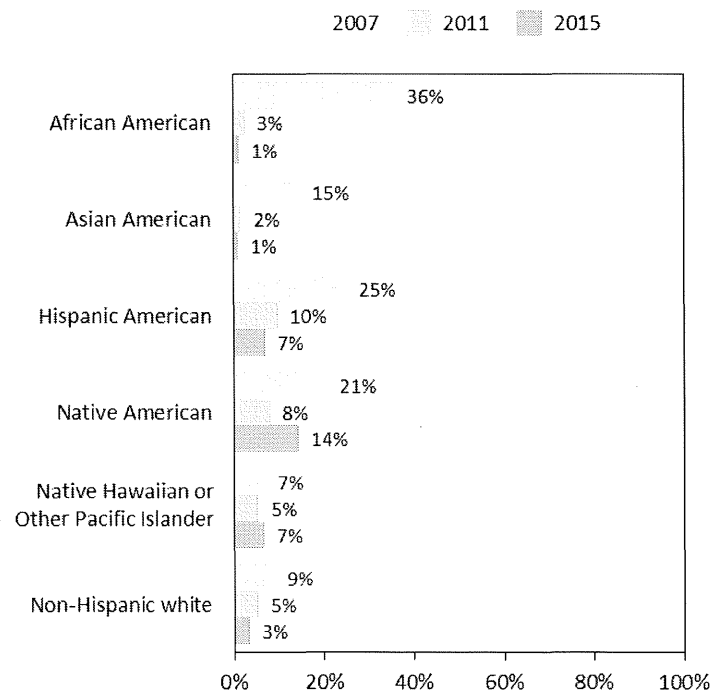
Figure G-4 shows the percent of conventional home purchase loans that were subprime in Minnesota, based on 2007, 2011 and 2015 HMDA data. The use of subprime loans in 2011 and 2015 were dramatically lower overall than in 2007 due to the collapse of the mortgage lending market in the late 2000s.

Hispanic American and Native American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in all three years (2007, 2011 and 2015).

African Americans and Asian Americans were more likely than non-Hispanic whites to receive subprime loans in 2007, but not in later years.

**Figure G-4.**  
Percent of conventional home purchase loans in Minnesota that were subprime, 2007, 2011 and 2015

Source:  
FFIEC HMDA data 2007, 2011 and 2015.



<sup>31</sup> Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

Figure G-5 examines the percentage of conventional home refinance loans that were subprime in Minnesota in 2007, 2011 and 2015. As with home purchase loans, the share of refinance loans in 2011 and 2015 that were subprime was dramatically lower than in 2007 due to the collapse of the mortgage lending market in the late 2000s.

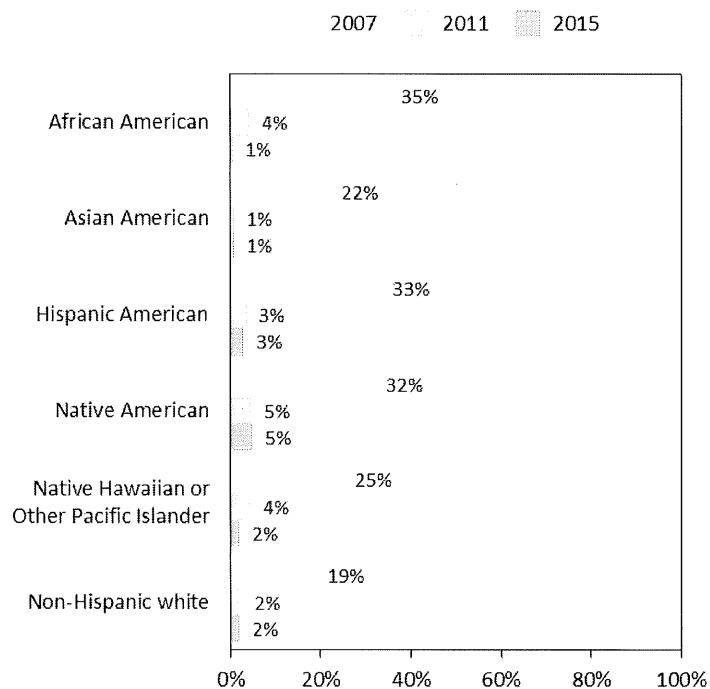
In Minnesota, patterns in the use of subprime loans for home refinance were similar to those for home purchase loans. Compared to non-Hispanic white borrowers, all minority groups receiving refinance loans in 2007 were more likely to obtain subprime refinance loans.

Differences were smaller in 2011, but most minority groups receiving refinance loans were still somewhat more likely than non-Hispanic whites for those loans to be subprime (Asian American borrowers were an exception).

By 2015, subprime loans made up a much smaller proportion of the total conventional home refinance loans issued in that year (in Minnesota). The decrease in subprime refinance loans was evident for all racial/ethnic groups in Minnesota, but Native American households that received refinance loans in 2015 were still somewhat more likely than non-Hispanic whites to be issued subprime loans.

**Figure G-5.**  
Percent of conventional  
refinance loans in Minnesota  
that were subprime, 2007, 2011  
and 2015

Source:  
FFIEC HMDA data 2007, 2011 and 2015.



**Additional research.** Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”<sup>32</sup> Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.<sup>33</sup> Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities. A 2001 HUD study using 1998 HMDA data found that subprime loans were disproportionately concentrated in African American neighborhoods compared with white neighborhoods, even after controlling for income.<sup>34</sup> For example, borrowers in higher-income African American neighborhoods were six times more likely to refinance with subprime loans than borrowers in higher-income white neighborhoods.

**Implications of the recent mortgage lending crisis.** The turmoil in the housing market starting late 2007 has been far-reaching, resulting in the loss of home equity, decreased demand for housing and increased rates of foreclosure.<sup>35</sup> Much of the blame has been placed on risky practices in the mortgage industry including substantial increases in subprime lending. As discussed above, the number of subprime mortgages increased at an extraordinary rate between the mid-1990s and mid-2000s. Those high-cost, high-interest loans increased from 8 percent of originations in 2003 to 20 percent in 2005 and 2006.<sup>36</sup> The preponderance of subprime lending is important because households that are repaying subprime loans have a greater likelihood of delinquency or foreclosure. A 2008 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”<sup>37</sup>

Such problems substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses. That issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that “one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those

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<sup>32</sup> Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001. HUD-Treasury National Predatory Lending Task Force Report. *HUD*; Carr, J. and L. Kolluri. 2001. Predatory Lending: An Overview. *Fannie Mae Foundation*; and California Reinvestment Coalition, Community Reinvestment Association of North Carolina, Empire Justice Center, Massachusetts Affordable Housing Alliance, Neighborhood Economic Development Advocacy Project, Ohio Fair Lending Coalition and Woodstock Institute. 2008. “Paying More for the American Dream.”

<sup>33</sup> Freddie Mac. September, 1996. “Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families.” *Freddie Mac*. (accessed February 5, 2007); and Lanzerotti. 2006. “Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California.” *Federal Reserve Bank of San Francisco*.

<sup>34</sup> Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

<sup>35</sup> Joint Center for Housing Studies of Harvard University. 2008. “The State of the Nation's Housing.”

<sup>36</sup> *Ibid.*

<sup>37</sup> Gerardi, Shapiro, and P. Willen. 2008. “Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure.” *Federal Reserve Bank of Boston*.

small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press.”<sup>38</sup>

- On November 20, 2008, Randall Kroszner told the U.S. House of Representatives Committee on Small Business that “small business and household finances are, in practice, very closely intertwined. [T]he most recent Survey of Small Business Finances (SSBF) indicated that about 15 percent of the total value of small business loans in 2003 was collateralized by ‘personal’ real estate. Because the condition of household balance sheets can be relevant to the ability of some small businesses to obtain credit, the fact that declining house prices have weakened household balance-sheet positions suggests that the housing market crisis has likely had an adverse impact on the volume and price of credit that small businesses are able to raise over and above the effects of the broader credit market turmoil.”<sup>39</sup>

Federal Reserve Chairman Ben Bernanke recognized the reality of those concerns in a speech titled “Restoring the Flow of Credit to Small Businesses” on July 12, 2010.<sup>40</sup> Bernanke indicated that small businesses have had difficulty accessing credit and pointed to the declining value of real estate as one of the primary obstacles.

Furthermore, the National Federation of Independent Business (NFIB) conducted a national survey of 751 small businesses in late-2009 to investigate how the recession impacted access to capital.<sup>41, 42</sup> NFIB concluded that “falling real estate values (residential and commercial) severely limit small business owner capacity to borrow and strains currently outstanding credit relationships.” Survey results indicated that 95 percent of small business employers owned real estate and 13 percent held “upside-down” property — that is, property for which the mortgage is worth more than its appraised value.

Another study analyzed the Survey of Consumer Finances to explore racial/ethnic disparities in wealth and how those disparities were impacted by the recession.<sup>43</sup> The study showed that there are substantial wealth disparities between African Americans and whites as well as between Hispanics and whites and that those wealth disparities worsened between 1983 and 2010. In addition to growing over time, the wealth disparity also grows with age — whites are on a higher accumulation curve than African Americans or Hispanics. The study also reports that the 2007 through 2009 recession exacerbated wealth disparities, particularly for Hispanics.

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<sup>38</sup> Mishkin, Frederic. 2008. “Statement of Frederic S. Mishkin, Member, Board of Governors of the Federal Reserve System before the Committee on Small Business and Entrepreneurship, U.S. Senate on April 16.”

<sup>39</sup> Kroszner, Randall. 2008. “Effects of the financial crisis on small business.” *Testimony before the Committee on Small Business, U.S. House of Representative on November 20.*

<sup>40</sup> Bernanke, Ben. 2010. Restoring the Flow of Credit to Small Businesses. *Presented at the Federal Reserve Meeting Series: Addressing the Financing Needs of Small Businesses on July 12.*

<sup>41</sup> The study defined a small business as a business employing no less than one individual in addition to the owner(s) and no more than 250 individuals.

<sup>42</sup> National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

<sup>43</sup> McKernan, Signe-Mary, Caroline Ratcliffe, Eugene Steverle and Sisi Zhang. 2013. “Less Than Equal: Racial Disparities in Wealth Accumulation.” Urban Institute.



Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Even though housing markets have improved since the Great Recession, there may be long-lasting effects on current and potential business owners.

**Redlining.** Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as African American or mixed-race neighborhoods.<sup>44</sup> That practice can perpetuate problems in already poor neighborhoods.<sup>45</sup> Most quantitative studies have failed to find strong evidence in support of geographic dimensions of lender decisions. Studies in Columbus, Ohio; Boston, Massachusetts and Houston, Texas found that racial differences in loan denial had little to do with the racial composition of a neighborhood but rather with the individual characteristics of the borrower.<sup>46</sup> Some studies found the race of an applicant — but not the racial makeup of the neighborhood — to be a factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through procedures that are not observable in actual loan decisions. Examples include branch placement, advertising and other pre-application procedures.<sup>47</sup> Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business start-up because local banking sectors often finance local businesses.<sup>48</sup> Redlining practices would deny that resource to minorities.

**Steering by real estate agents.** Historically, differences in the types of loans that are issued to minorities have also been attributed to “steering” by real estate agents, who serve as an information filter.<sup>49</sup> Despite the fact that steering has been prohibited by law for many decades, some studies claim that real estate brokers provide different levels of assistance and different information on loans to minorities than they do to non-minorities.<sup>50</sup> Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

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<sup>44</sup> Holloway, Steven R. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.” *Annals of the Association of American Geographers*. 88: 252-276.

<sup>45</sup> Ladd, Helen F. 1998. “Evidence on Discrimination in Mortgage Lending.” *The Journal of Economic Perspectives*. 12: 41-62.

<sup>46</sup> See Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”; Tootell. 1996. “Redlining in Boston: Do Mortgage Lenders Discriminate Against Neighborhoods?”; and Holmes, Andrew and Paul Horvitz. 1994. “Mortgage Redlining: Race, Risk, and Demand.” *The Journal of Finance*. 49: 81-99.

<sup>47</sup> Yinger, John. 1995. “Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination.” Russell Sage Foundation. New York. 78-79.

<sup>48</sup> Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”

<sup>49</sup> Kantor, Amy C. and John D. Nystuen. 1982. “De Facto Redlining a Geographic View.” *Economic Geography*. 4: 309-328.

<sup>50</sup> Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78-79.

**Gender discrimination in mortgage lending.** Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Perceived risks associated with granting loans to women of childbearing age and unmarried women resulted in “income discounting,” limiting the availability of loans to women.<sup>51</sup>

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. For example, there is some past evidence that lenders under-appraised properties for female borrowers.<sup>52</sup>

## Summary

There is evidence that minorities and women continue to face certain disadvantages in accessing capital that is necessary to start, operate and expand businesses. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Key results included the following:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Minnesota own homes compared with non-Hispanic whites. African Americans, Hispanic Americans and Native Americans who do own homes tend to have lower home values.
- High-income African American, Asian American, Native American and Native Hawaiian or other Pacific Islander households applying for conventional home mortgages in Minnesota were more likely than high-income non-Hispanic whites to have their applications denied.
- Before the collapse of the home mortgage market in the late 2000s, subprime loans accounted for a much larger share of the conventional home purchase and refinance loan issued to minority groups compared with loans going to non-Hispanic whites.

Any discrimination against minority groups in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in Minnesota and the success and growth of those companies.

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<sup>51</sup> Card. 1980. “Women, Housing Access, and Mortgage Credit.”

<sup>52</sup> Ladd, Helen F. 1982. “Equal Credit Opportunity: Women and Mortgage Credit.” *The American Economic Review*. 72: 166-170.

## **APPENDIX H.**

### **Success of Businesses in Construction, Professional Services, Goods and Other Services Industries in Minnesota**

The study team examined the success of minority- and women-owned business enterprises (MBE/WBEs) in construction, professional services, goods and other services industries. The study team assessed whether business outcomes for MBE/WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

#### **Business Closures, Expansions and Contractions**

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses in Minnesota and in the nation as a whole. 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 Minnesota.** 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.<sup>1, 2</sup> The SBA report examined patterns in each state but not in individual metropolitan areas. Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses.

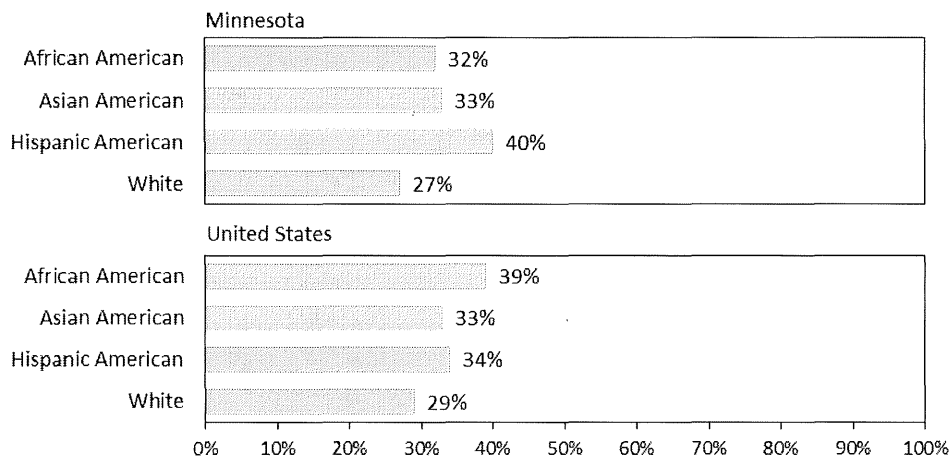
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<sup>1</sup> Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

<sup>2</sup> 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.

As shown in Figure H-1, 40 percent of Hispanic American-owned businesses operating in Minnesota in 2002 had closed by the end of 2006, a higher rate than that of all other groups. African American- and Asian American-owned firms also had closure rates higher than for non-minority-owned businesses during this time period. Disparities in closure rates for minority-owned firms compared to white-owned firms appear to have been similar in Minnesota and in the United States during the same time period.

Figure H-1.  
Rates of business closure, 2002 through 2006, Minnesota 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, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

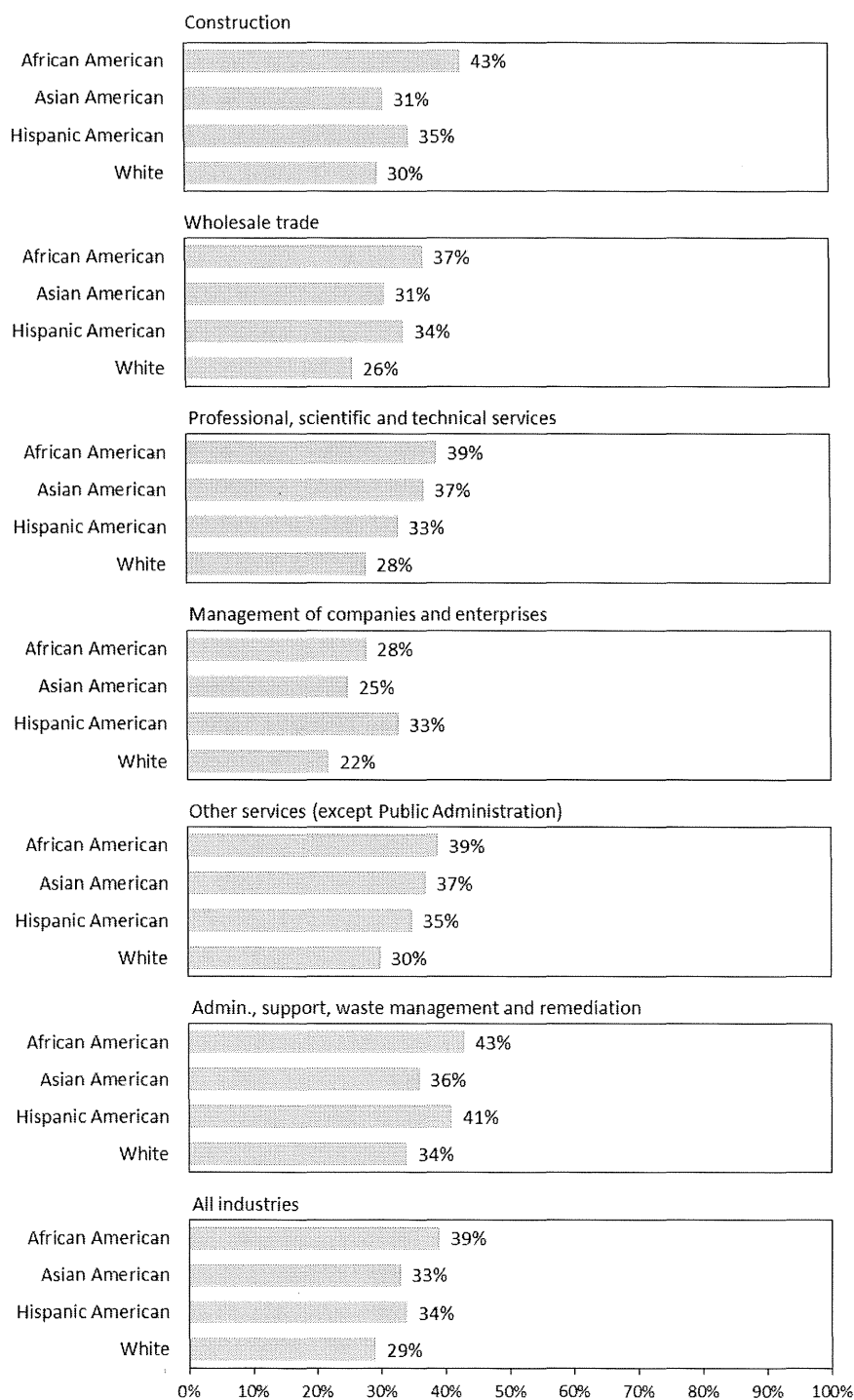
**Rates of business closures by industry.** The SBA report also examined business closure rates by race/ethnicity for 21 different industry classifications. Figure H-2 compares national rates of firm closure for construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation. Figure H-2 also presents closure rates for all industries by race/ethnicity.

Minority-owned businesses that were operating in the United States in 2002 had the higher rate of closure by 2006 in all study industries and all industries relative to white-owned businesses. African American-owned businesses that were operating in the United States in 2002 had the highest rate of closure by 2006 among all racial/ethnic groups — including white-owned businesses — in all industries (39%) and all relevant study industries with the exception of management of companies and enterprises.

Hispanic American-owned company and enterprise management businesses that were operating in 2002 had the highest rate of closure in 2006 (33%). The study team could not examine whether those differences also existed in the Minneapolis-St. Paul metropolitan study area or in Minnesota as a whole because the SBA analysis by industry was not available for individual states or metropolitan areas.

Figure H-2.

Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

**Unsuccessful closures.** Not all business closures can be interpreted as “unsuccessful closures.” Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent “successful closures.” The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.<sup>3</sup> 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.<sup>4, 5, 6</sup>

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 and wholesale trade industries, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58% and 59%, respectively). Those trends were similar in the services industry with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

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<sup>3</sup> CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

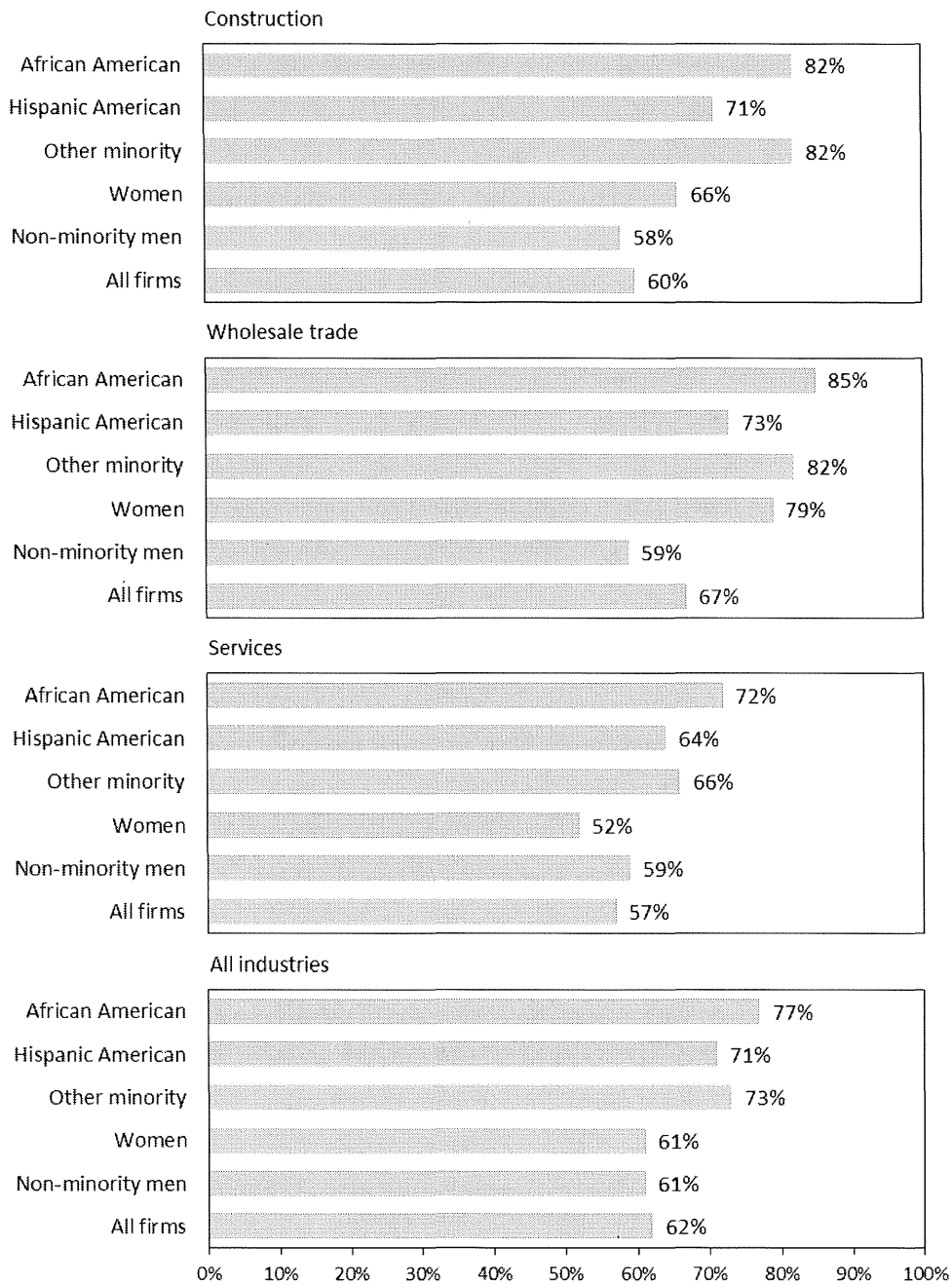
<sup>4</sup> All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. “Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey.” *Journal of Business & Economic Statistics*. 14(2): 231-241. This report does not include CBO data on overall business closure rates, because businesses not responding to the survey were found to be much more likely to have closed than ones that did.

<sup>5</sup> This study includes CBO data on firm success because there is no compelling reason to believe that closed businesses responding to the survey would have reported different rates of success/failure than those closed businesses that did not respond to the survey. Headd, Brian. U.S. Small Business Administration, Office of Advocacy. 2000. *Business Success: Factors leading to surviving and closing successfully*. Washington D.C.: 12.

<sup>6</sup> Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

Figure H-3.

Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

**Reasons for differences in unsuccessful closure rates.** Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses may be largely due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability. 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.<sup>7</sup>
- Prior work experience in a family member's business or similar experiences are found to be strong determinants of business viability. Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.<sup>8</sup> Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.<sup>9</sup>
- Level of education is found to be a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and non-minority-owned businesses.<sup>10</sup>
- Non-minority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.<sup>11</sup>
- The possession of greater initial capital and generally higher levels of education among Asian Americans are related to the relatively high rate of survival of Asian American-owned businesses compared to other minority-owned businesses.<sup>12</sup>

**Expansions and contractions.** Comparing rates of expansion and contraction between minority-owned and white-owned businesses is also useful in assessing the success of minority-owned businesses. As with closure data, only some of the data on expansions and contractions that were available for the nation were also available at the state level.

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<sup>7</sup> Bates, Timothy and Caren Grown. 1991. "Commercial Lending Practices and the Development of Black-Owned Construction Companies." Center for Economic Studies, U.S. Census Bureau.

<sup>8</sup> Robb, A. and Fairlie, R. 2005. "Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital." University of California, Santa Cruz.

<sup>9</sup> Fairlie, R. and A. Robb. 2009. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." University of California, Santa Cruz.

<sup>10</sup> *Ibid.* 24.

<sup>11</sup> Bates, Timothy. 2002. "Analysis of Young Small Businesses That Have Closed: Delineating Successful from Unsuccessful Closures." Center for Economic Studies, U.S. Census Bureau.

<sup>12</sup> Bates, Timothy. 1993. "Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses." Center for Economic Studies, U.S. Census Bureau.

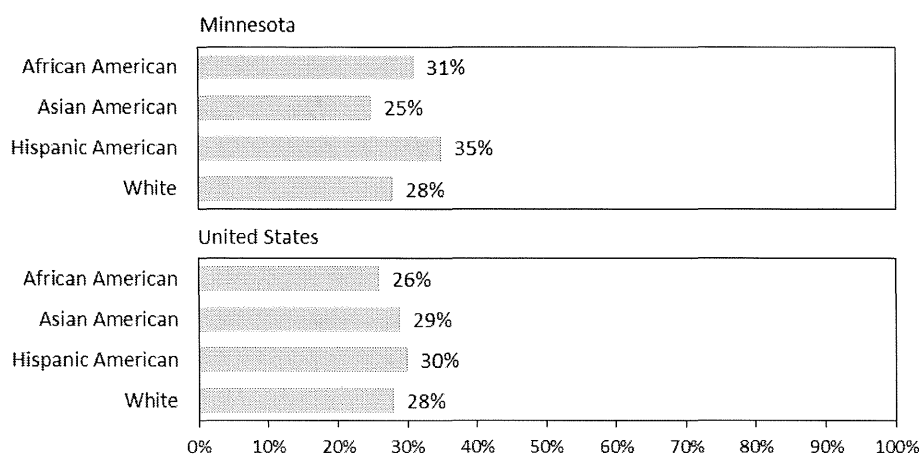


**Expansions.** The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Minnesota businesses that expanded and contracted between 2002 and 2006. Figure H-4 presents the percentage of all businesses that increased their total employment between 2002 and 2006. Those data are presented for Minnesota and for the nation as a whole.

Approximately 28 percent of white-owned Minnesota businesses expanded between 2002 and 2006, compared to 31 percent of African American-owned businesses, 25 percent of Asian American-owned businesses and 35 percent of Hispanic American-owned businesses. Expansion results were similar for the nation as a whole.

**Figure H-4.**

Percentage of businesses that expanded, 2002 through 2006, Minnesota and the U.S.



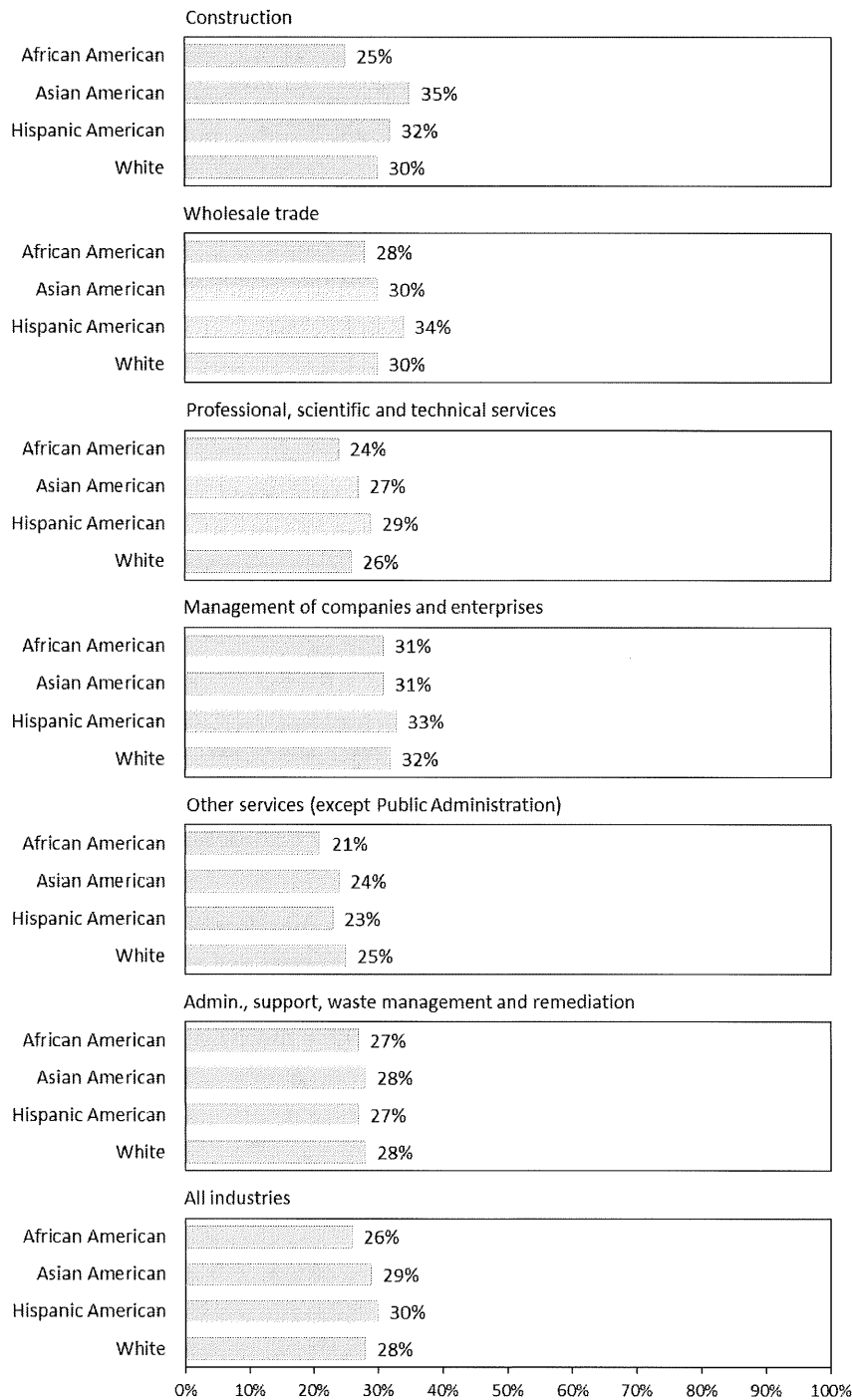
**Note:** Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation and in all industries in the United States. The SBA study did not report results for businesses in individual industries at the state level.

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

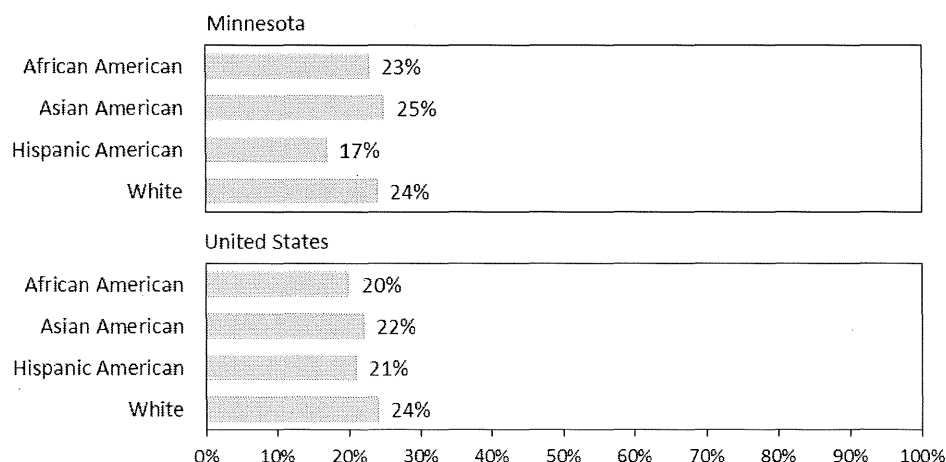
At the national level, the patterns evident for study industries were similar to those observed for all industries:

- African American-owned businesses in the relevant study industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Asian American-owned businesses in the management of companies and enterprises and other services industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Hispanic American-owned companies in the construction; wholesale trade; professional, scientific and technical services, and management of companies and enterprises industries were more likely than white-owned businesses to have expanded between 2002 and 2006.

**Contraction.** Figure H-6 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Minnesota and in the nation as a whole. In both Minnesota and the United States as a whole, African American- and Hispanic American-owned businesses were less likely to have contracted in 2002 through 2006 than white-owned businesses. In Minnesota, Asian American-owned businesses were more likely to have contracted than white-owned businesses.

Figure H-6.

Percentage of businesses that contracted, 2002 through 2006, Minnesota and the U.S.



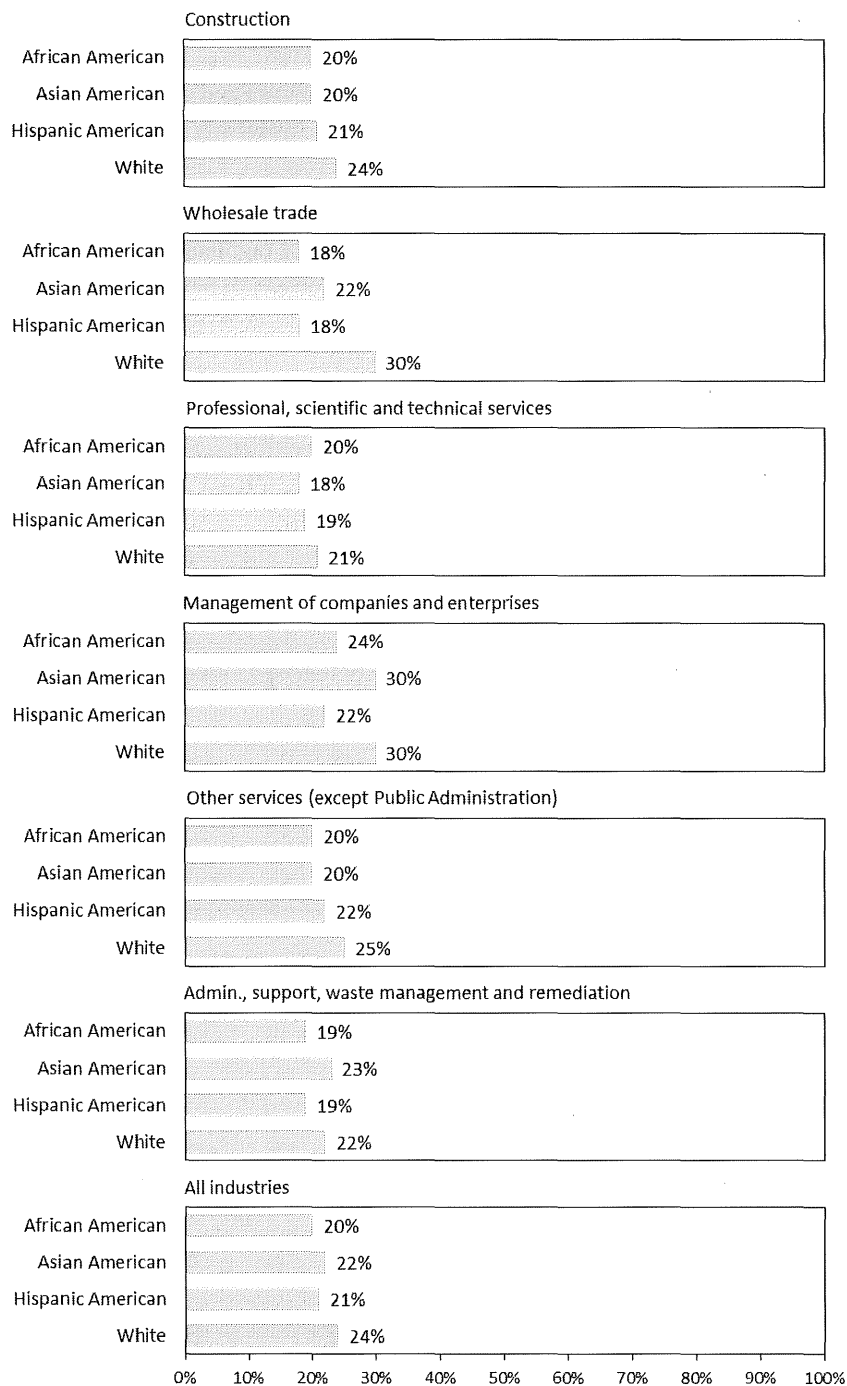
**Note:** Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 shows the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

Figure H-7.

Percentage of businesses that contracted, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

## 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 2011-2015 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Minnesota market area that the study team collected as part of availability interviews.

**Business receipts.** The study team examined receipts for businesses using data from the 2012 SBO, conducted by the U.S. Census Bureau.<sup>13</sup> 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.<sup>14</sup>

**Receipts for all businesses.** Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Racial categories in Minnesota are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans. The SBO data for businesses across all industries in Minnesota indicate that average receipts for minority- and women-owned businesses were much lower than that for non-Hispanic-owned, white-owned or male-owned businesses, with some groups faring worse than others. Using the SBO groupings of minority-owned businesses:

- Average receipts of African American-owned businesses (\$80,000) were less than 15 percent that of white-owned businesses (\$550,000).
- Average receipts of both American Indian and Alaska Native-owned businesses (\$174,000) and Native Hawaiian and other Pacific Islander (\$199,000) were about one-third that of white-owned businesses.
- Average receipts of Asian American-owned businesses (\$244,000) were less than half that of white-owned businesses.
- Hispanic-owned businesses (\$189,000) exhibited revenues that were approximately one-third of the average of non-Hispanic-owned businesses (\$524,000).
- Average receipts for male-owned businesses (\$749,000) were almost five times greater than the average for women-owned businesses (\$156,000).

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<sup>13</sup> The 2012 SBO data are not available at the same geographic level as Census and ACS data. For most marketplace analyses using Census and ACS data, results are presented for two Wisconsin counties (Pierce and St. Croix) in addition to Minnesota as a whole. Analyses using the SBO data, however, are conducted for Minnesota only.

<sup>14</sup> We use “all businesses” to denote SBO data used in this analysis. The data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. The study team did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for American Indian and Alaska Natives, Asians, Black or African Americans, Native Hawaiian and Other Pacific Islanders, other races and whites.

Disparities in business receipts for minority- and women-owned businesses compared to non-Hispanic white- and male-owned businesses in Minnesota are consistent with those seen in the United States as a whole. A 2007 SBA study identified differences similar to those presented in Figure H-8 when examining businesses in all industries across the U.S.<sup>15</sup>

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.

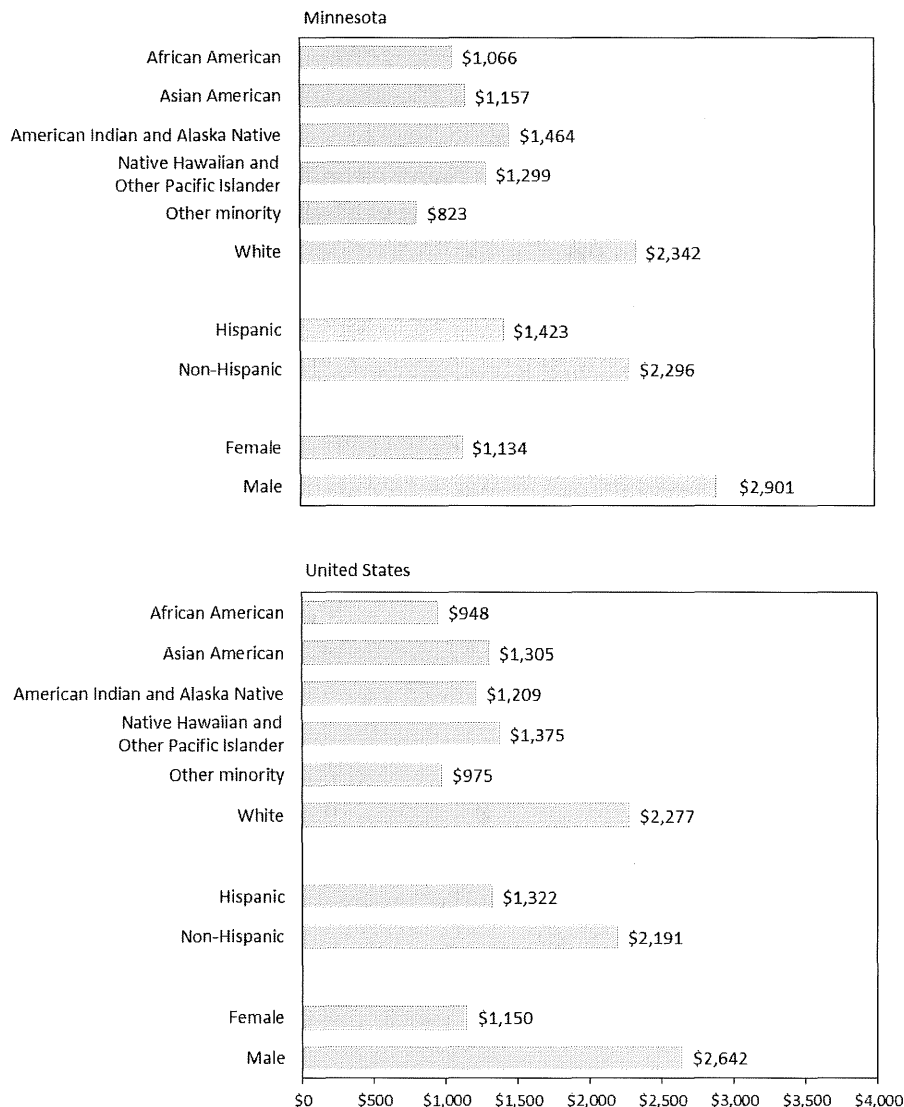
<sup>15</sup> Lowrey, Ying. 2007. *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.

Figure H-9 presents average annual receipts in 2012 for only employer businesses in Minnesota and in the United States. (Employer businesses are those with paid employees.) Minority- and women-owned businesses had substantially lower average business receipts than non-Hispanic-, white- and male-owned employer businesses in Minnesota:

- Average receipts of Native Hawaiian and Other Pacific Islander-owned businesses (\$1.3 million) were 55 percent of the average of white-owned businesses (\$2.3 million).
- Average receipts of American Indian and Alaska Native-owned businesses (\$1.5 million) were about two-thirds that of the average of white-owned businesses.
- Average receipts of African American-owned businesses (\$1.1 million) were less than half that of the average for white-owned businesses.
- Asian American-owned businesses had average receipts (\$1.2 million) that were half of the average of white-owned businesses.
- Hispanic American-owned businesses had average receipts (\$1.4 million) that were about two-thirds that of non-Hispanic-owned businesses (\$2.3 million).
- Average receipts for women-owned businesses (\$1.1 million) were 39 percent of the average of male-owned businesses (\$2.9 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 separately for businesses in the relevant study industries. Figure H-10 and H-11 present mean annual receipts in 2012 for all (i.e., employer and non-employer businesses combined) businesses in the relevant study industries and for just employer businesses by racial, ethnic and gender group. Results are presented for Minnesota and for the nation as a whole.



Figure H-10.

Mean annual receipts (thousands) for all firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

| All firms                                  | All industries together | Construction | Wholesale trade | Management | Administrative and other services | Professional, scientific and technical services | Other Services |
|--|-------------------------|--------------|-----------------|------------|-----------------------------------|---|----------------|
| <b>Minnesota</b>                           |                         |              |                 |            |                                   |   |                |
| <b>Race</b>                                |                         |              |                 |            |                                   |   |                |
| African American                           | \$ 80                   | N/A          | \$ 213          | N/A        | \$ 117                            | \$ 48   | \$ 17          |
| Asian American                             | 244                     | \$ 258       | 2,331           | \$ 601     | 130                               | 139   | 42             |
| American Indian and Alaska Native          | 174                     | 370          | N/A             | N/A        | 521                               | 92  | 38             |
| Native Hawaiian and Other Pacific Islander | 199                     | N/A          | N/A             | N/A        | 27                                | N/A   | 43             |
| Other minority                             | 100                     | 106          | N/A             | N/A        | 30                                | 31  | 32             |
| White                                      | 550                     | 559          | 4,618           | 3,650      | 259                               | 200   | 91             |
| <b>Ethnicity</b>                           |                         |              |                 |            |                                   |   |                |
| Hispanic                                   | \$ 189                  | \$ 131       | N/A             | N/A        | N/A                               | \$ 70   | \$ 34          |
| Non-Hispanic                               | 524                     | 561          | \$ 4,446        | \$ 3,622   | \$ 253                            | 196   | 84             |
| <b>Gender</b>                              |                         |              |                 |            |                                   |   |                |
| Female                                     | \$ 156                  | \$ 440       | \$ 2,032        | \$ 1,310   | \$ 129                            | \$ 85   | \$ 34          |
| Male                                       | 749                     | 567          | 5,627           | 4,277      | 317                               | 265   | 120            |
| <b>United States</b>                       |                         |              |                 |            |                                   |   |                |
| <b>Race</b>                                |                         |              |                 |            |                                   |   |                |
| African American                           | \$ 58                   | \$ 81        | \$ 529          | \$ 2,312   | \$ 42                             | \$ 76   | \$ 17          |
| Asian American                             | 365                     | 200          | 2,654           | 3,105      | 179                               | 245   | 59             |
| American Indian and Alaska Native          | 142                     | 206          | 949             | 2,723      | 92                                | 102   | 39             |
| Native Hawaiian and Other Pacific Islander | 149                     | 272          | 842             | 1,468      | 70                                | 148   | 53             |
| Other minority                             | 94                      | 86           | 852             | 1,438      | 39                                | 105   | 30             |
| White                                      | 508                     | 455          | 4,422           | 3,668      | 221                               | 235   | 94             |
| <b>Ethnicity</b>                           |                         |              |                 |            |                                   |   |                |
| Hispanic                                   | \$ 143                  | \$ 117       | \$ 1,502        | \$ 4,556   | \$ 50                             | \$ 121  | \$ 37          |
| Non-Hispanic                               | 482                     | 467          | 4,289           | 3,594      | 221                               | 235   | 80             |
| <b>Gender</b>                              |                         |              |                 |            |                                   |   |                |
| Female                                     | \$ 144                  | \$ 350       | \$ 1,778        | \$ 2,574   | \$ 74                             | \$ 104  | \$ 32          |
| Male                                       | 638                     | 415          | 5,060           | 4,014      | 280                               | 301   | 111            |

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

In Minnesota, when considering all industries together, average 2012 receipts for most minority and female-owned businesses were lower than the average for non-Hispanic, white- and male-owned businesses. In general, these trends persisted when analyzing industry-specific data in Minnesota. Within the study industries, where data was available for specific minority groups and females, those groups generally earned less than non-Hispanic, white- and male-owned businesses. Results across all study industries indicate that:

- Average receipts of African American-owned businesses were between 5 and 46 percent that of white-owned businesses;
- Average receipts of Asian American-owned businesses were between 16 and 70 percent that of white-owned businesses;
- Average receipts of American Indian and Alaska Native-owned businesses were between 42 and 201 percent that of white-owned businesses;
- Average receipts of Native Hawaiian and other Pacific Islander-owned businesses were between 10 and 47 percent that of white-owned businesses;
- Average receipts of Hispanic-owned businesses were between 23 and 40 percent that of the average of non-Hispanic-owned businesses; and
- Average receipts for women-owned businesses varied between 21 and 78 percent that of the average of male-owned businesses.

Figure H-11.

Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

| All firms                                  | All industries together | Construction | Wholesale trade | Management | Administrative and other services | Professional, scientific and technical services | Other services |
|--|-------------------------|--------------|-----------------|------------|-----------------------------------|---|----------------|
| <b>Minnesota</b>                           |                         |              |                 |            |                                   |   |                |
| <b>Race</b>                                |                         |              |                 |            |                                   |   |                |
| African American                           | \$ 1,066                | N/A          | \$ 1,659        | N/A        | \$ 1,604                          | \$ 650  | \$ 385         |
| Asian American                             | 1,157                   | \$ 1,253     | 6,406           | 601        | 2,477                             | 769   | 208            |
| American Indian and Alaska Native          | 1,464                   | 1,101        | N/A             | N/A        | 9,346                             | N/A   | 1,198          |
| Native Hawaiian and Other Pacific Islander | 1,299                   | N/A          | N/A             | N/A        | N/A                               | N/A   | N/A            |
| Other minority                             | 823                     | N/A          | N/A             | N/A        | N/A                               | N/A   | 232            |
| White                                      | 2,342                   | 1,826        | 9,247           | 3,650      | 1,122                             | 821   | 490            |
| <b>Ethnicity</b>                           |                         |              |                 |            |                                   |   |                |
| Hispanic                                   | \$ 1,423                | \$ 603       | N/A             | N/A        | N/A                               | \$ 502  | \$ 199         |
| Non-Hispanic                               | 2,296                   | 1,843        | \$ 9,050        | \$ 3,622   | \$ 1,157                          | 826   | 479            |
| <b>Gender</b>                              |                         |              |                 |            |                                   |   |                |
| Female                                     | \$ 1,134                | \$ 1,842     | \$ 6,861        | \$ 1,310   | \$ 1,257                          | \$ 457  | \$ 238         |
| Male                                       | 2,901                   | 1,973        | 10,334          | 4,277      | 1,231                             | 1,016   | 593            |
| <b>United States</b>                       |                         |              |                 |            |                                   |   |                |
| <b>Race</b>                                |                         |              |                 |            |                                   |   |                |
| African American                           | \$ 948                  | \$ 1,096     | \$ 5,134        | \$ 2,312   | \$ 856                            | \$ 816  | \$ 321         |
| Asian American                             | 1,305                   | 1,223        | 5,061           | 3,105      | 1,260                             | 1,154   | 275            |
| American Indian and Alaska Native          | 1,209                   | 1,266        | 5,167           | 2,723      | 1,112                             | 605   | 459            |
| Native Hawaiian and Other Pacific Islander | 1,375                   | 1,732        | 6,777           | 1,468      | 1,170                             | 1,274   | N/A            |
| Other minority                             | 975                     | 839          | 3,764           | 1,438      | 587                               | 1,139   | 326            |
| White                                      | 2,277                   | 1,730        | 9,774           | 3,668      | 1,219                             | 983   | 564            |
| <b>Ethnicity</b>                           |                         |              |                 |            |                                   |   |                |
| Hispanic                                   | \$ 1,322                | \$ 1,005     | \$ 5,431        | \$ 4,556   | \$ 720                            | \$ 865  | \$ 383         |
| Non-Hispanic                               | 2,191                   | 1,749        | 9,367           | 3,594      | 1,238                             | 999   | 528            |
| <b>Gender</b>                              |                         |              |                 |            |                                   |   |                |
| Female                                     | \$ 1,150                | \$ 1,561     | \$ 6,471        | \$ 2,574   | \$ 962                            | \$ 620  | \$ 293         |
| Male                                       | 2,642                   | 1,842        | 10,421          | 4,014      | 1,378                             | 1,167   | 636            |

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

SBO data indicated that average receipts were higher for employer businesses than for all businesses (i.e., employer and non-employer businesses combined). In Minnesota, when considering only employer firms, average 2012 receipts for most minority and female-owned businesses were lower than the average for non-Hispanic, white- and male-owned businesses.

In general, these trends persisted when analyzing industry-specific data in Minnesota. Within the study industries, where data was available for specific minority groups and females, those groups generally earned less than non-Hispanic, white- and male-owned businesses. However, all racial minority groups and females earned more than white- and male-owned businesses in Administrative and other services. Results across all study industries for employer firms indicate that:

- Average receipts of African American-owned businesses were between 18 and 143 percent that of white-owned businesses;
- Average receipts of Asian American-owned businesses were between 16 and 220 percent that of white-owned businesses;
- Average receipts of American Indian and Alaska Native-owned businesses were between 60 and 832 percent that of white-owned businesses;<sup>16</sup>
- Average receipts of Hispanic-owned businesses were between 33 and 61 percent that of the average of non-Hispanic-owned businesses; and
- Average receipts for women-owned businesses varied between 31 and 102 percent that of the average of male-owned businesses.

**Business earnings.** In order to assess the success of self-employed minorities and women in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2011-2015 ACS. The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings.

**Business owner earnings, 2011-2015.** The 2011-2015 ACS also reports business owner earnings. Respondents were asked throughout the year to report total pre-tax business earnings accrued during the 12 months immediately preceding the month of the survey. Accordingly, earnings corresponding to the 2011-2015 ACS timeframe consist of 60 individual reference periods spanning 2010-2015.<sup>17</sup>

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<sup>16</sup> This variation may be due to small sample sizes.

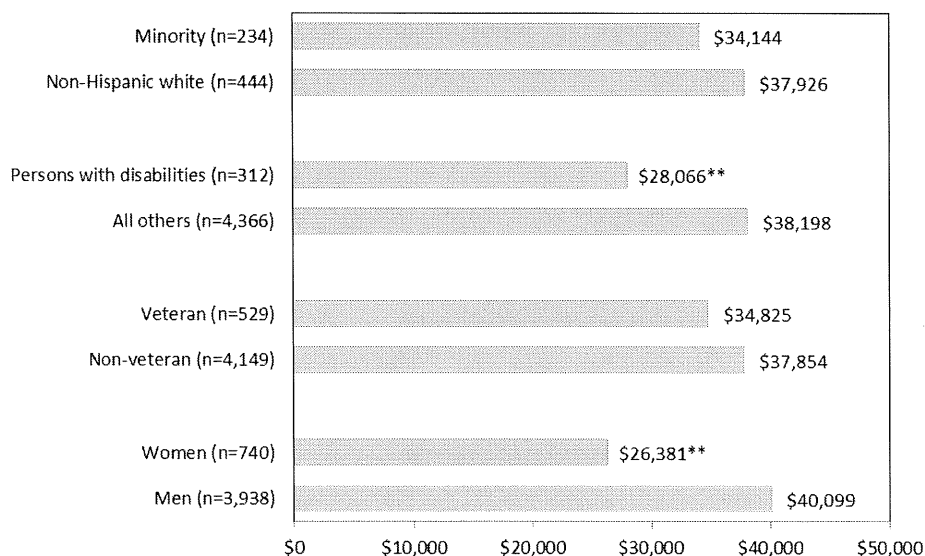
<sup>17</sup> For example, if a business owner completed the survey on January 2011, the figures for the previous 12 months would reference January 2010 to December 2010. Similarly, a business owner completing the survey in March 2013 would reference amounts between March 2012 and February 2013.

Figure H-12 shows earnings in 2011 through 2015 for business owners in all study industries in Minnesota. The study team analyzed earnings for veterans and targeted groups, which includes minorities, females and persons with disabilities.<sup>18</sup> Due to small sample sizes, all minority business owners were combined into a single category.

- On average, business owners with disabilities in Minnesota (\$28,066) earned substantially less in 2011-2015 than all others (\$38,198), a statistically significant difference.
- Female business owners (\$26,381) earned significantly less on average than male business owners (\$40,099) in Minnesota from 2011-2015.
- Average earnings for minority business owners (\$34,144) were similar to those of non-Hispanic white business owners (\$37,926) in Minnesota from 2011-2015.
- Average earnings for veteran business owners (\$34,825) were similar to those of non-veteran business owners (\$37,854) in Minnesota from 2011-2015.

Figure H-12.

Mean annual business owner earnings among all study industries, 2011 through 2015, Minnesota



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 2015 dollars.

Source: BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

<sup>18</sup> The Minnesota Department of Administration Office of State Procurement (OSP) and the Minnesota Department of Transportation operate a program for Targeted Group, Economically Disadvantaged and Veteran-Owned small businesses. In addition to woman and racial minorities, business owners with a substantial physical disability are eligible for certification as a Targeted Group small business. Veterans are eligible to be certified as a Veteran-Owned small business. Therefore, veterans and persons with a disability are studied when appropriate throughout the marketplace analyses in this study (Appendices E, F, G and H).

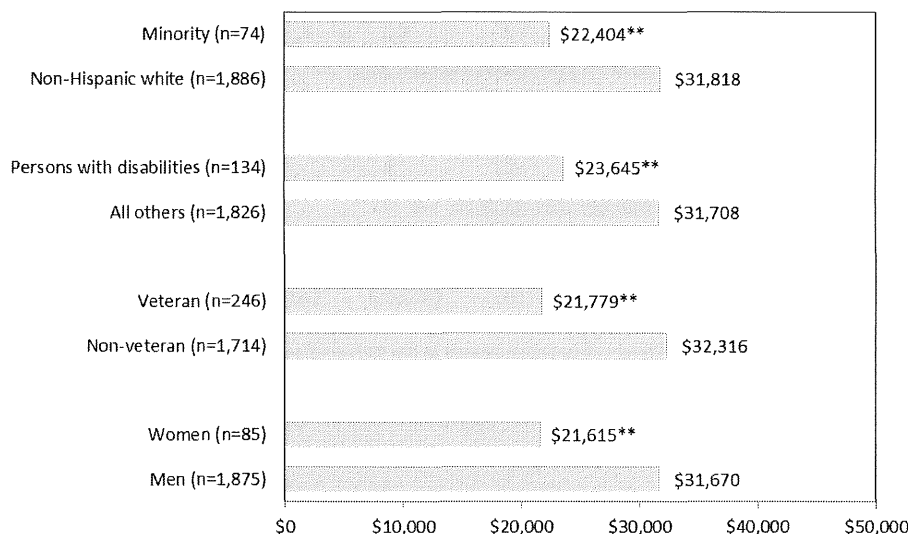
**Construction business owner earnings, 2011-2015.** The 2011-2015 ACS construction business owner earnings data correspond to the 2011-2015 ACS timeframe consisting of 60 individual reference periods spanning 2010-2015.

Figure H-13 shows earnings in 2011 through 2015 for business owners by target group in the construction industry in Minnesota and the nation as a whole. Again, due to sample sizes for individual minority groups, Asian Pacific Americans, Subcontinent Asian Americans, Native Americans and other minorities were combined.

- On average, minority construction business owners in Minnesota (\$22,404) earned less in 2011-2015 than non-Hispanic white construction business owners (\$31,818), a statistically significant difference.
- Construction business owners with a disability (\$23,645) earned substantially less on average in 2011-2015 than all other business owners (\$31,708), a statistically significant difference.
- On average, veteran business owners in the construction industry (\$21,779) earned substantially less than non-veteran construction business owners (\$32,316) in Minnesota from 2011-2015.
- Average earnings for female construction business owners (\$21,615) were substantially less than those of male construction business owners (\$31,670) in Minnesota from 2011-2015.

**Figure H-13.**

**Mean annual business owner earnings in the construction industry, 2011 through 2015, Minnesota**



**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 2015 dollars.

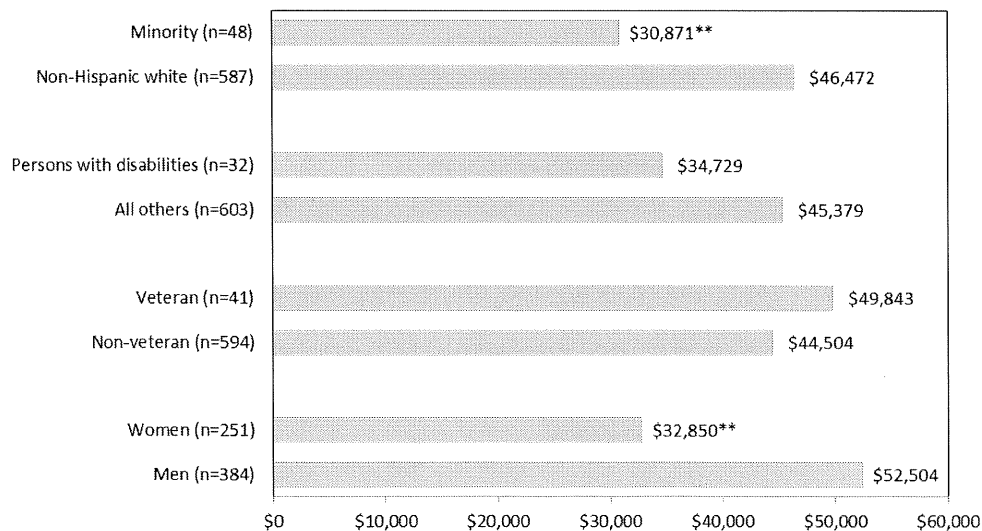
**Source:** BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Professional services business owner earnings, 2011-2015.** As with earnings data for the construction industry, earnings for professional services business owners that were reported in the 2011-2015 ACS data were for the time period between 2011 and 2015. All dollar amounts are presented in 2015 dollars. Due to small sample sizes, all minority business owners were combined into a single category. Those results are displayed in Figure H-14.

- On average, minority business owners in Minnesota (\$30,871) earned less in 2011-2015 than non-Hispanic white business owners (\$46,472) in the professional services industry, a statistically significant difference.
- Female professional services business owners (\$32,850) earned significantly less on average than male professional services business owners (\$52,504) in Minnesota from 2011-2015.
- Average earnings for professional services business owners with a disability (\$34,729) were similar to those of all other professional services business owners (\$45,379) in Minnesota from 2011-2015.
- Average earnings for veteran business owners in the professional services industry (\$49,843) were similar to those of non-veteran business owners (\$44,504) in Minnesota from 2011-2015.

**Figure H-14.**

**Mean annual business owner earnings in the professional services industry, 2011 through 2015, Minnesota**



**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 2015 dollars.

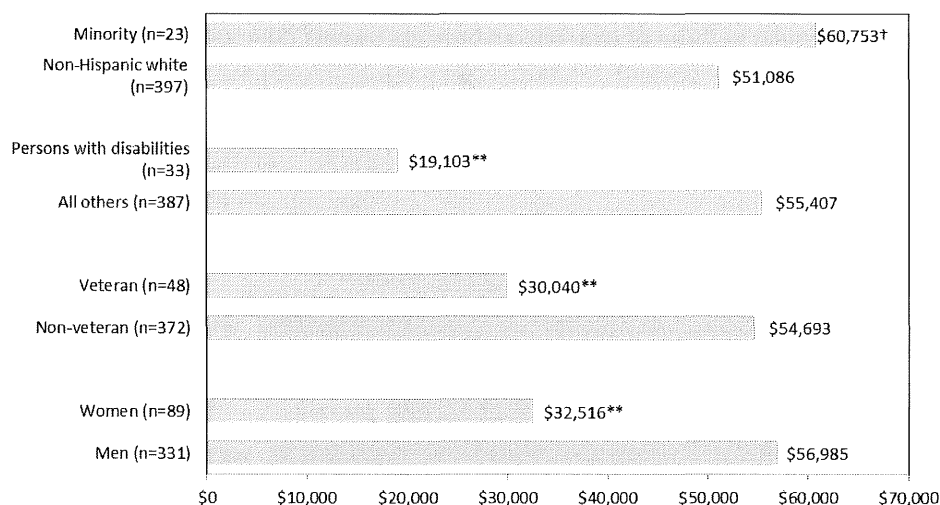
**Source:** BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Goods business owner earnings, 2011-2015.** As with earnings data for the construction and professional services industries, earnings for goods business owners that were reported in the 2011-2015 ACS data were for the time period between 2011 and 2015. All dollar amounts are presented in 2015 dollars. Again, due to small sample sizes, all minority business owners were combined into a single category. Those results are displayed in Figure H-15.

- Average earnings for business owners with disabilities in the goods industry (\$19,103) were substantially less than all other business owners in the goods industry (\$55,407) in Minnesota in 2011 through 2015.
- Average earnings for veteran business owners in the goods industry (\$30,040) were less than non-veteran business owners (\$54,693) in Minnesota in 2011 through 2015.
- Average earnings for female business owners in the goods industry (\$32,516) were less than earnings of male business owners (\$56,985) in Minnesota in 2011 through 2015.

**Figure H-15.**

**Mean annual business owner earnings in the goods industry, 2011 through 2015, Minnesota**



**Note:** The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.  
**\*\*** Denotes statistically significant differences between groups at the 95% confidence level.

**†** Denotes that the sample size did not reach the minimum required (25 per group) to qualify for significance testing. Therefore, significance tests were not conducted between minority and non-Hispanic white business owners.

**Source:** BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

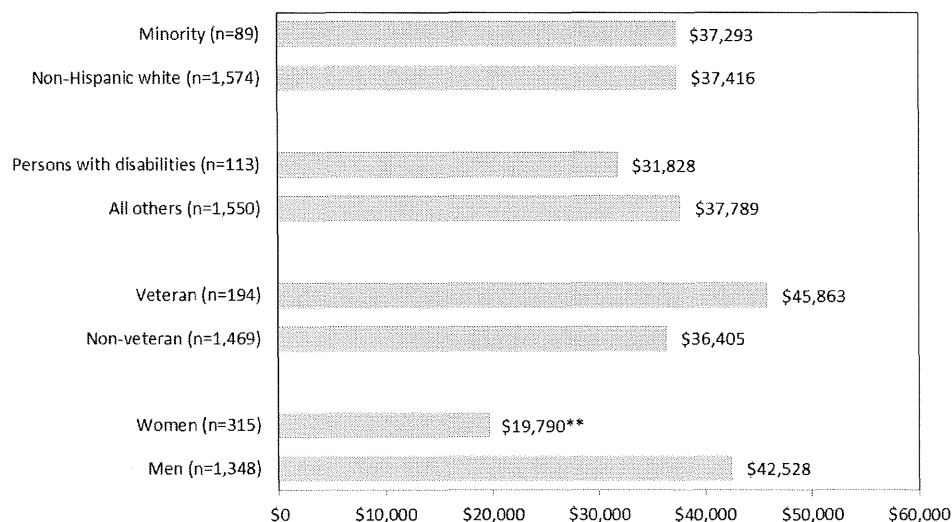


**Other services business owner earnings, 2011-2015.** As with earnings data for the previously reported industries, earnings for other services business owners that were reported in the 2011-2015 ACS data were for the time period between 2011 and 2015. All dollar amounts are presented in 2015 dollars. Again, due to small sample sizes, all minority business owners were combined into a single category. Those results are displayed in Figure H-16.

- Average earnings for minority business owners in other services industry (\$37,293) were similar to earnings of non-Hispanic white business owners (\$37,416) in Minnesota in 2011 through 2015.
- Average earnings for business owners with disabilities in the other services industry (\$31,828) were similar to earnings of all other business owners (\$37,789) in Minnesota in 2011 through 2015.
- Average earnings for veteran business owners in the other services industry (\$45,863) were similar to non-veteran business owners (\$36,405) in Minnesota in 2011 through 2015.
- Average earnings for female business owners in the other services industry (\$19,790) were substantially less than the earnings of male business owners (\$42,528) in Minnesota in 2011 through 2015.

**Figure H-16.**

**Mean annual business owner earnings in the other services industry, 2011 through 2015, Minnesota**



**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 2015 dollars.

**Source:** BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Regression analyses of business earnings.** Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created statistical models through “regression analysis” to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after controlling for certain race- and gender-neutral factors. Data came from the ACS for the state for 2011-2015.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.<sup>19</sup> The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

The study team developed models for business owner earnings in 2011 through 2015 for Minnesota in the following industries:

- A model for business owner earnings in the construction industry that included 1,960 observations;
- A model for business owner earnings in the professional services industry that included 635 observations;
- A model for business owner earnings in the goods industry that included 420 observations; and
- A model for business owner earnings in the other services industry that included 1,633 observations.

**Construction industry regression results, 2011 through 2015.** Figure H-17 illustrates the results of the regression model for 2011 through 2015 earnings in the construction industry in Minnesota. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the construction industry in Minnesota:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower earnings;
- Married business owners tended to have greater business earnings than unmarried business owners; and
- Having an advanced degree was associated with lower business earnings.

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<sup>19</sup> For example, National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation; and National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

After statistically controlling for race- and gender-neutral factors, the model indicated a statistically significant disparity in earnings for female business owners.

**Figure H-17.**  
Minnesota construction business owner earnings model, 2011-2015

Note:

\*,\*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Variable              | Coefficient |
|-----------------------|-------------|
| Constant              | 7.575 **    |
| Age                   | 0.076 **    |
| Age-squared           | -0.001 **   |
| Married               | 0.532 **    |
| Speaks English well   | 0.483       |
| Disabled              | -0.208      |
| Less than high school | -0.186      |
| Some college          | -0.072      |
| Four-year degree      | -0.170      |
| Advanced degree       | -0.672 *    |
| Minority              | -0.428      |
| Female                | -0.856 *    |

Professional services industry regression results, 2011 through 2015. Figure H-18 presents the results of the regression model of business owner earnings specific to Minnesota professional services industry for 2011 through 2015. The model indicated that older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower earnings.

After accounting for race- and gender-neutral factors, the model indicated a statistically significant disparity in earnings for female business owners. Being a minority business owner had little effect.

**Figure H-18.**  
Minnesota professional services business owner earnings model, 2011-2015

Note:

\*\* Denotes statistical significance at the 95% confidence level.

Source:

BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Variable              | Coefficient |
|-----------------------|-------------|
| Constant              | 5.162 **    |
| Age                   | 0.201 **    |
| Age-squared           | -0.002 **   |
| Married               | 0.376       |
| Speaks English well   | -0.015      |
| Disabled              | -0.515      |
| Less than high school | -0.465      |
| Some college          | -0.086      |
| Four-year degree      | 0.191       |
| Advanced degree       | -0.149      |
| Minority              | -0.037      |
| Female                | -0.549 **   |

Goods industry regression results, 2011 through 2015. Figure H-19 presents the results of the regression model of business owner earnings specific to the Minnesota goods industry for 2011 through 2015. The model indicated that some race- and gender-neutral factors significantly predicted earnings of business owners in the goods industry in Minnesota:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had slightly lower earnings;
- Speaking English well was associated with greater business earnings; and
- Educational attainment impacted business earnings. Having less than a high school diploma was associated with greater business earnings; however, having a college or advanced degree was also associated with greater business earnings.

After accounting for race- and gender-neutral factors, the model indicated a statistically significant disparity in earnings for female business owners. Being a minority business owner had little effect.

Figure H-19.  
Minnesota goods business owner earnings model,  
2011-2015

Note:

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Variable              | Coefficient |
|-----------------------|-------------|
| Constant              | 4.460 **    |
| Age                   | 0.090 **    |
| Age-squared           | -0.001 **   |
| Married               | 0.056       |
| Speaks English well   | 3.274 **    |
| Disabled              | -0.331      |
| Less than high school | 1.211 **    |
| Some college          | 0.548       |
| Four-year degree      | 0.765 *     |
| Advanced degree       | 1.562 **    |
| Minority              | 0.027       |
| Female                | -1.047 **   |

Other services industry regression results, 2011 through 2015. Figure H-20 presents the results of the regression model of business owner earnings specific to the Minnesota other services industry for 2011 through 2015. The model indicated that some race- and gender-neutral factors significantly predicted earnings of business owners in the other services industry in Minnesota:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals had lower earnings;
- Being married was associated with greater business earnings;
- Disabled business owners tended to have lower business earnings;<sup>20</sup> and
- Having less than a high school education was associated with lower business earnings.

After accounting for neutral factors, the model indicated a statistically significant disparity in earnings for female business owners.

Figure H-20.  
Minnesota other services business owner earnings  
model, 2011-2015

Note:

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

BBC Research & Consulting from 2011-2015 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

| Variable              | Coefficient |
|-----------------------|-------------|
| Constant              | 5.276 **    |
| Age                   | 0.200 **    |
| Age-squared           | -0.002 **   |
| Married               | 0.277 **    |
| Speaks English well   | -0.097      |
| Disabled              | -0.666 **   |
| Less than high school | -0.363 *    |
| Some college          | -0.006      |
| Four-year degree      | -0.013      |
| Advanced degree       | -0.077      |
| Minority              | -0.507      |
| Female                | -0.649 **   |

**Gross revenue of firms from availability interviews.** As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone interviews that Keen Independent conducted (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous three years: from 2014 through 2016. Only firms with locations in Minnesota or in the two Wisconsin counties within the Minneapolis-St. Paul MSA were included in the availability interviews.

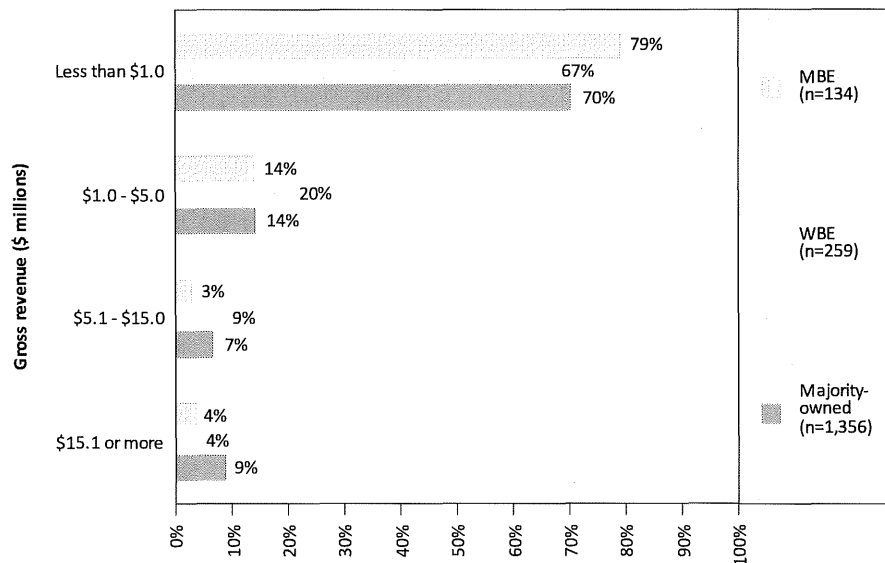
<sup>20</sup> This factor includes all disabilities, including mental disabilities, which do not qualify for the Minnesota Department of Administration Office of State Procurement's (OSP) program for Targeted Groups. Only those with a physical or sensory disability qualify for certification as a Targeted Group small business in Minnesota.

**Construction.** Figure H-21 presents the reported annual revenue for MBE, WBE and majority-owned construction businesses in the Minnesota availability interviews. Majority-owned construction firms were more likely to report higher average annual revenues relative to minority- and women-owned construction firms in Minnesota.

- About 79 percent of MBEs reported average revenue of less than \$1 million per year compared to 67 percent of WBEs and 70 percent of majority-owned firms.
- After combining the highest revenue categories, relatively few MBEs WBEs (4%) reported average revenue of more than \$15 million per year compared with 9 percent of majority-owned businesses.

Figure H-21.

Average annual gross revenue of company over previous three years, Minnesota construction industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

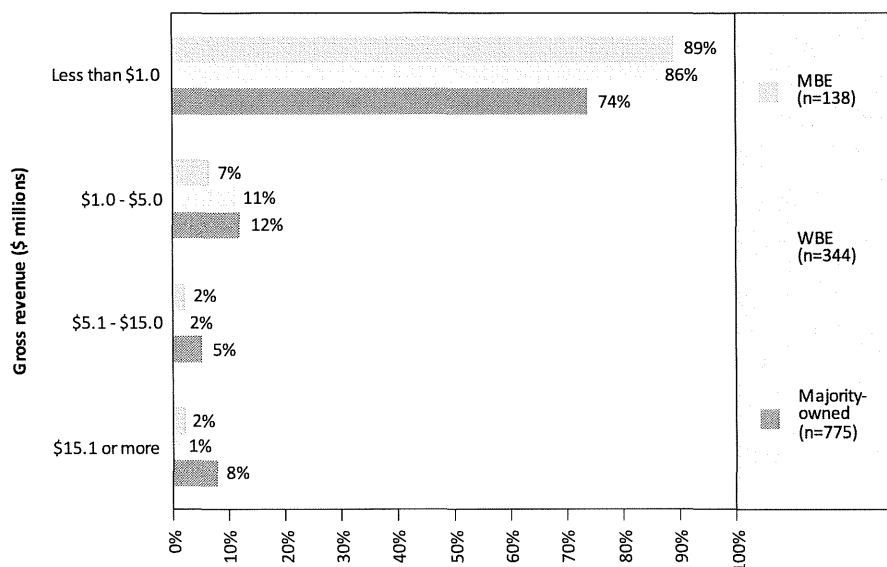
Source: Keen Independent Research from 2017 availability interviews.

**Professional services.** Figure H-22 presents the reported annual revenue for MBEs, WBEs and majority-owned professional services businesses in Minnesota. MBEs and WBEs were more likely to report lower annual revenues compared to majority-owned businesses.

- A higher percentage of MBEs (89%) and WBEs (86%) than majority-owned professional services businesses (74%) reported average revenue of less than \$1 million per year.
- Relatively few MBE firms (2%) and WBE firms (1%) reported average revenue of more than \$15 million per year compared with majority-owned businesses (8%).

Figure H-22.

Average annual gross revenue of company over previous three years, Minnesota 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.

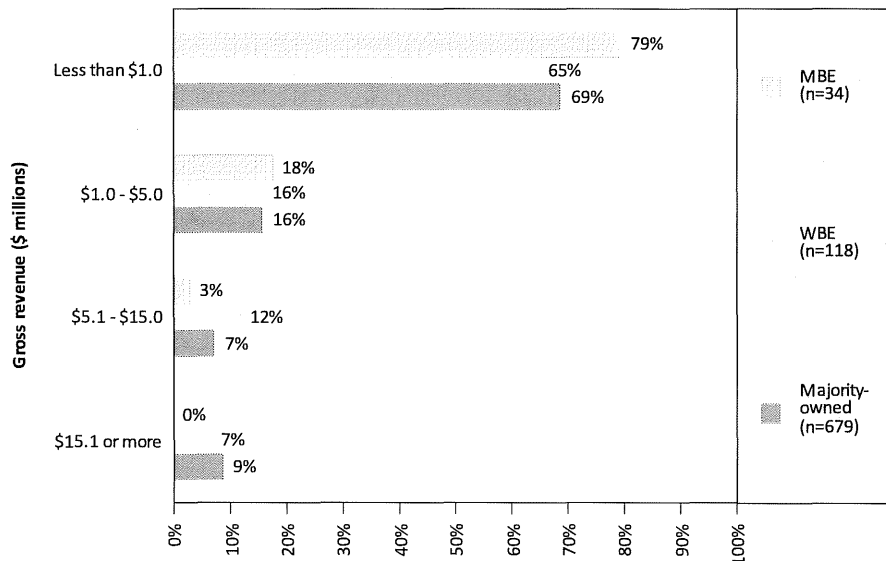
Source: Keen Independent Research from 2017 availability interviews.

**Goods.** Majority-owned goods firms were more likely to report high average annual revenue relative to minority-owned goods firms in Minnesota.

- About 79 percent of MBE goods firms reported average revenue of less than \$1 million per year compared to 65 percent of WBEs and 69 percent of majority-owned firms.
- WBEs (12%) were more likely than MBEs and majority-owned firms to report average revenue between \$5 million and \$15 million per year.
- No MBE goods firms surveyed reported average revenue of more than \$15 million per year. About 7 percent of WBEs and 9 percent of majority-owned businesses indicated annual review of more than \$15 million.

Figure H-23.

Average annual gross revenue of company over previous three years, Minnesota 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 2017 availability interviews.

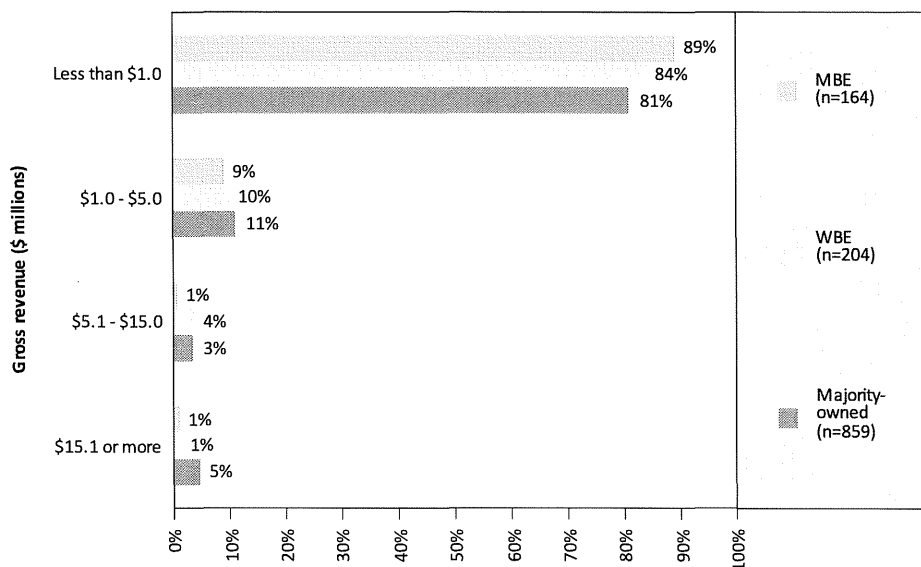


Other services. Majority-owned other services firms were more likely to report high average annual revenue than minority- and women-owned other services firms in the Minneapolis-St. Paul MSA.

- Relatively more other services firms that were MBEs (89%) and WBEs (84%) reported average revenue of less than \$1 million per year compared to majority-owned firms (81%).
- After combining the highest revenue categories, about 1 percent of MBEs and WBEs indicated average revenue of more than \$15 million per year compared with 5 percent of majority-owned other services businesses.

Figure H-24.

Average annual gross revenue of company over previous three years, Minnesota 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 2017 availability interviews.

## Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.<sup>21</sup> Keen Independent directly measured bid capacity in its availability analysis.<sup>22</sup>

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

**Data.** The availability analysis produced a database of construction, professional services and other services businesses for which bid capacity could be examined. (Keen Independent does not examine largest bids for goods as these contracts are often bid as indefinite quantity contracts with unit prices.)

“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 Keen Independent interviewed it.

**Results.** As shown in Figure H-25, relatively few firms reported performing or bidding on contracts of \$20 million or more. Most companies indicated that their largest contract was less than \$100,000. For example, in construction, 54 percent of MBEs, 47 percent of WBEs and 54 percent of majority-owned firms indicated that the largest contract they had bid on or been awarded was less than \$100,000. Although WBE construction firms were somewhat more likely to report bidding on contracts between \$100,000 and \$1 million than other groups, about the same percentage of MBE, WBE and majority-owned construction firms indicated bidding on contracts of \$1 million or more.

For other services firms, more than three-quarters of MBEs, WBEs and majority-owned firms reported that the largest contract they had bid on or been awarded was less than \$100,000. Results between groups were similar for each contract amount (bottom of Figure H-25).

Among professional services firms, however, MBEs and WBEs were less likely than majority-owned firms to have been awarded or bid on contracts of \$1 million or more.

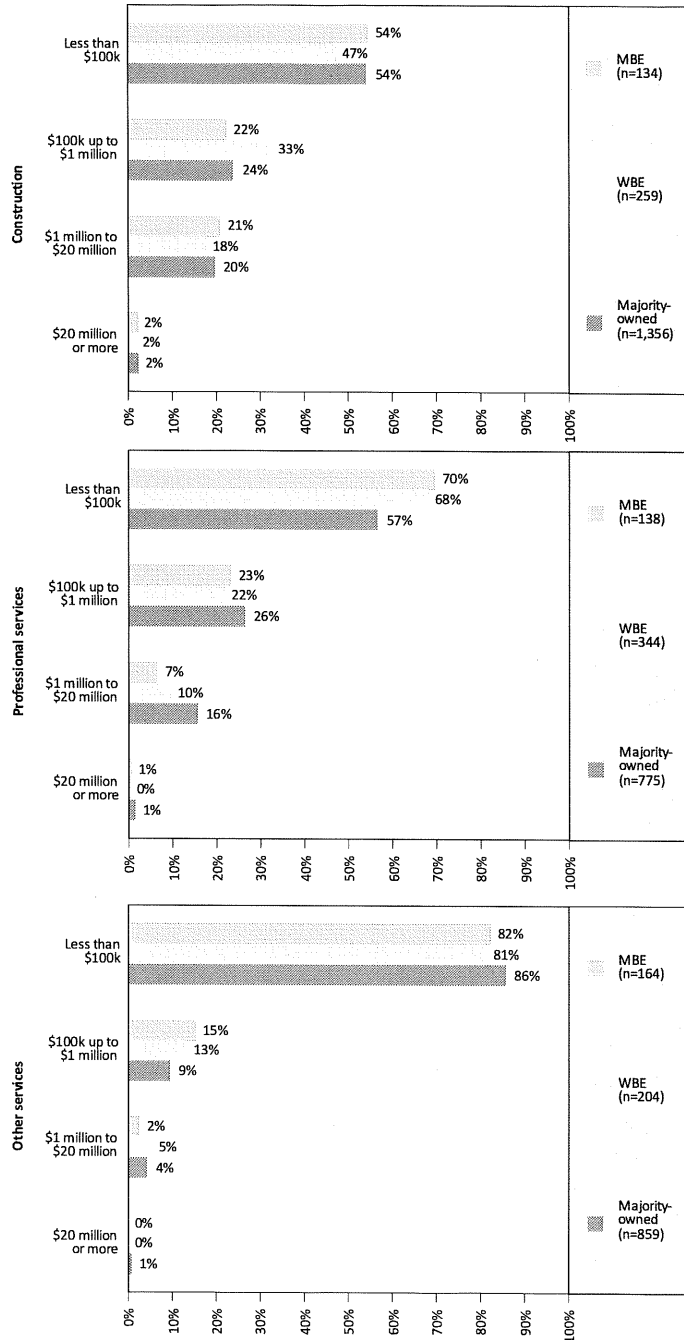
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<sup>21</sup> For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

<sup>22</sup> See Appendix C for details about the availability interview process.

Figure H-25.

Largest contract bid on or awarded (bid capacity) by industry for construction, professional services and other services firms in Minnesota



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 2017 availability interviews.

**Above median bid capacity.** Keen Independent further explored bid capacity on a subindustry level. Subindustries such as construction management and development tend to involve relatively large projects. Other subindustries, such as landscape contracting and maintenance, typically involve smaller contracts. Figure H-26 reports the median relative bid capacity among Minnesota businesses in 47 subindustries. Results categorized companies according to their primary line of business.

Figure H-26.

Median relative capacity of Minnesota businesses by subindustry

| Subindustry  | Median bid capacity          |
|--|------------------------------|
| <b>Construction</b>                                    |                              |
| Bridge or elevated highway construction                | \$10 million to \$20 million |
| Public or commercial building construction             | \$1 million to \$2 million   |
| Structural steel work                                  | \$1 million to \$2 million   |
| Multifamily building construction                      | \$500,000                    |
| Excavation, site prep, grading and drainage            | \$100,000 to \$500,000       |
| Underground utilities, including water and sewer lines | \$100,000 to \$500,000       |
| Road construction or paving                            | \$100,000 to \$500,000       |
| Installation of guardrails or signs                    | \$100,000 to \$500,000       |
| Electrical work including lighting and signals         | \$100,000 to \$500,000       |
| Plastering, drywall or insulation                      | \$100,000 to \$500,000       |
| Roofing  | \$100,000 to \$500,000       |
| Concrete work  | \$100,000 to \$500,000       |
| School building construction                           | \$100,000 or less            |
| Plumbing, heating or air conditioning                  | \$100,000 or less            |
| Landscape installation and maintenance                 | \$100,000 or less            |
| Trucking and hauling                                   | \$100,000 or less            |
| Construction materials supply                          | \$100,000 or less            |
| Other - construction                                   | \$100,000 to \$500,000       |
| <b>Professional services</b>                           |                              |
| Construction management                                | \$100,000 to \$500,000       |
| Architecture and engineering                           | \$100,000 to \$500,000       |
| Environmental consulting                               | \$100,000 to \$500,000       |
| IT and data services                                   | \$100,000 to \$500,000       |
| Benefits administration (health related services)      | \$100,000 to \$500,000       |
| Inspection and testing                                 | \$100,000 or less            |
| Advertising, marketing and public relations            | \$100,000 or less            |
| Business research and consulting                       | \$100,000 or less            |
| Other - professional services                          | \$100,000 or less            |

Source: Keen Independent Research from 2017 availability interviews.

Figure H-26.

Median relative capacity of Minnesota businesses by subindustry (continued)

| Subindustry                           | Median bid capacity         |
|---------------------------------------|-----------------------------|
| <b>Other services</b>                 |                             |
| Sign and traffic control equip rental | \$5 million to \$10 million |
| Helicopter services                   | \$100,000 to \$500,000      |
| Security guard services               | \$100,000 to \$500,000      |
| Elevator services                     | \$100,000 or less           |
| Construction equipment rental         | \$100,000 or less           |
| Local transportation services         | \$100,000 or less           |
| Parking services                      | \$100,000 or less           |
| Physical exam and testing             | \$100,000 or less           |
| Printing and copying                  | \$100,000 or less           |
| Security systems services             | \$100,000 or less           |
| Sewer cleaning and inspection         | \$100,000 or less           |
| Snow removal services                 | \$100,000 or less           |
| Staffing services                     | \$100,000 or less           |
| Vehicle repair                        | \$100,000 or less           |
| Waste collection and disposal         | \$100,000 or less           |
| Contracted food service               | \$100,000 or less           |
| Equipment repair services             | \$100,000 or less           |
| Building cleaning                     | \$100,000 or less           |
| Facilities operation and support      | \$100,000 or less           |
| Other - services                      | \$100,000 or less           |

Source: Keen Independent Research from 2017 availability interviews.

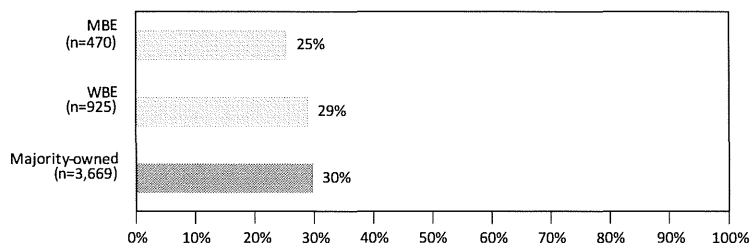
Comparison of above median bid capacity for MBEs, WBEs and majority-owned firms. Based on the median bid capacity figures identified in Figure H-27, Keen Independent classified firms into “above median bid capacity,” “at median bid capacity,” and “below median bid capacity” for their subindustry. About 25 percent of MBEs had above median bid capacity for their subindustry compared with 29 percent of WBEs and 30 percent of majority-owned firms.

Figure H-27.

Percent of firms above median bid capacity for their subindustry, Minnesota, 2017

Source:

Keen Independent Research from 2017 availability interviews.



Keen Independent regression analyses found that disparities in bid capacity for MBEs persisted after controlling for length of time in business (in addition to subindustry). Keen Independent developed a probit regression model of whether a firm had above median bid capacity for its subindustry that included as independent variables MBE status, WBE status and age of firm. The difference for MBE status was statistically significant at the 95 percent confidence level.

## Availability Interview Results Concerning Potential Barriers

As part of the availability interviews conducted with Minnesota businesses, Keen Independent asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the survey process and provides the survey questions.

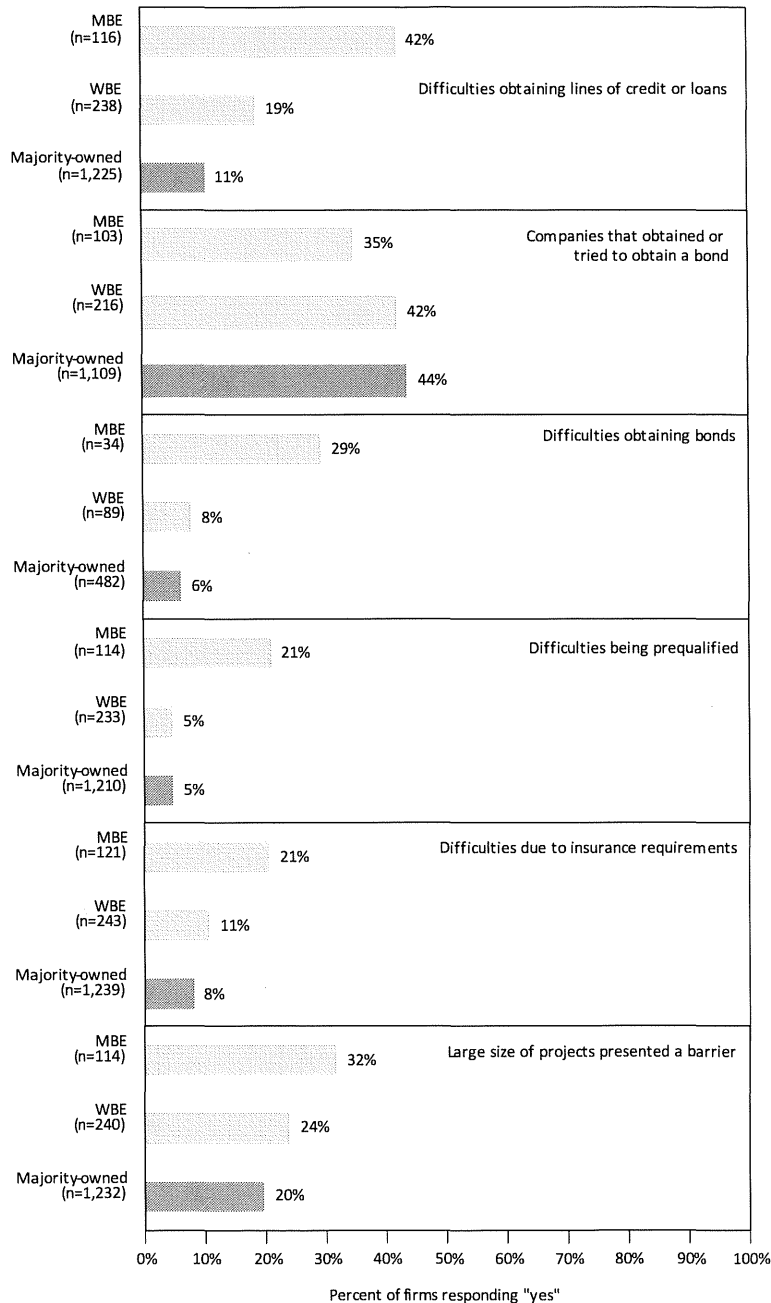
Results for interview questions are discussed within the context of the relevant study industry; some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three sets for each study industry: barriers to learning about bid opportunities, barriers related to project requirements and barriers related to access to capital.

**Construction.** In the availability survey, construction firms were asked about obtaining financing and bonding, being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Figure H-28 shows results.

- About 42 percent of MBE construction firms and 19 percent of WBE construction firms surveyed reported difficulties associated with obtaining lines of credit or loans compared with only 11 percent of majority-owned firms.
- Less than one-half of construction firms surveyed had obtained or tried to obtain bonds. Among those firms, MBEs (29%) were much more likely than WBEs (8%) and majority-owned firms (6%) to indicate difficulties obtaining bonds.
- Twenty-one percent of MBEs reported difficulties being prequalified for work compared with only 5 percent of WBEs and majority-owned firms.
- A larger percentage of MBEs (21%) than WBEs (11%) and majority-owned firms (8%) reported that insurance requirements on contracts were a barrier to bidding.
- MBEs (32%) and were more likely than WBEs (24%) and majority-owned construction firms (20%) to indicate that large contract size presented a barrier to bidding.

Figure H-28.

Responses to availability interview questions concerning loans, bonding and insurance, prequalification and size of projects, Minnesota MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

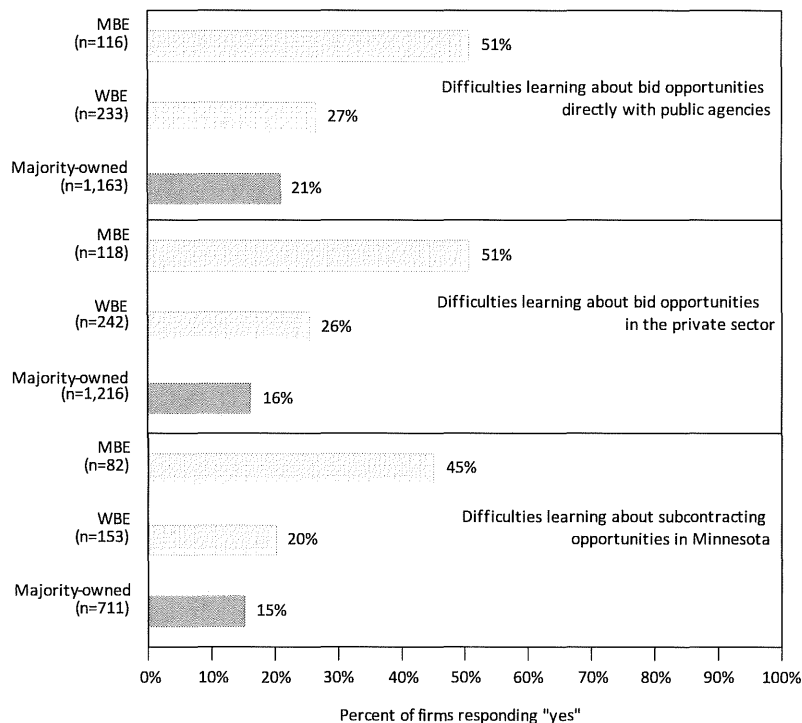
Source: Keen Independent Research from 2017 availability interviews.

The survey also asked construction firms about any difficulties learning about bid opportunities.

- In general, relatively more MBEs than majority-owned firms indicated difficulties learning about public and private sector bid opportunities and learning about subcontracting opportunities in Minnesota, as shown in Figure H-29. About one-half of MBE construction firms indicated such difficulties compared with 15 to 21 percent of majority-owned construction firms, depending on the question (see top of Figure H-29).
- Somewhat more WBEs than majority-owned firms indicated difficulties learning about bid opportunities.

Figure H-29.

Responses to availability interview questions concerning learning about work, Minnesota MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.

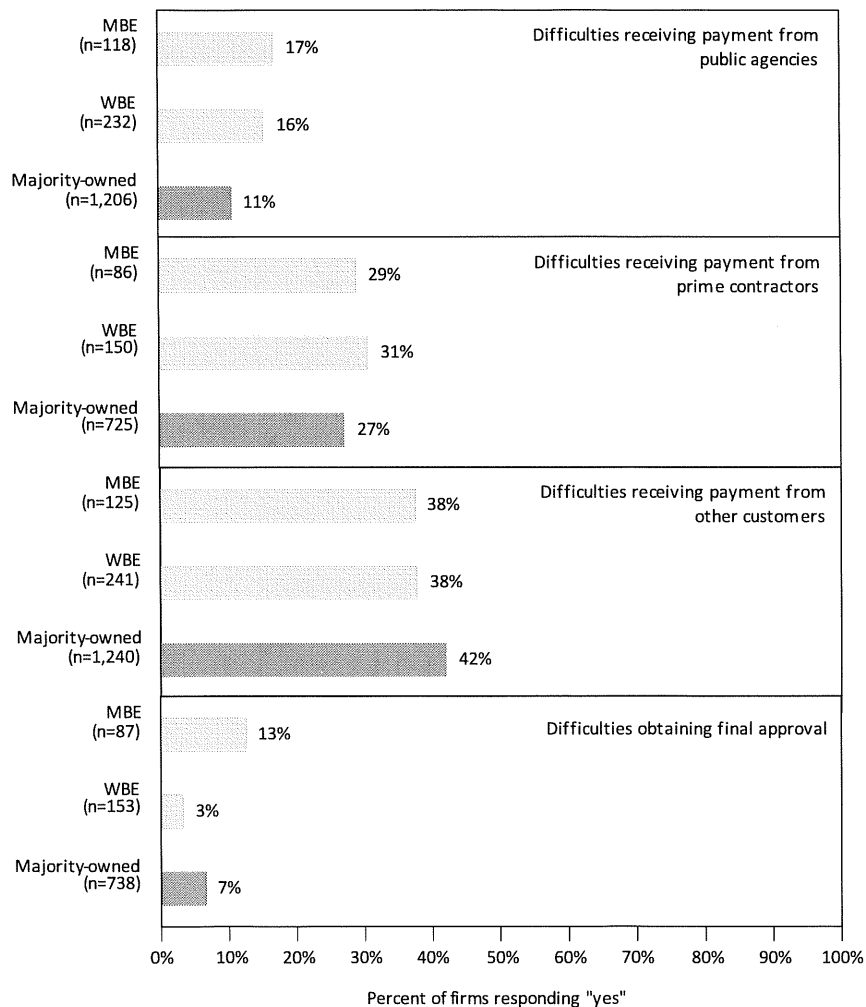


Keen Independent also examined the proportion of firms reporting difficulty receiving payments, as shown in Figure H-30.

- A larger proportion of MBEs (17%) and WBEs (16%) reported difficulty receiving payment from public agencies than majority-owned firms (11%).
- About one-quarter of construction firms said that they had experienced difficulties receiving payment from prime contractors. More than one-third indicated difficulties receiving payment from other customers. Results were similar among groups for these two questions.

Figure H-30.

Responses to availability interview questions concerning receipt of payments and approval of work, Minnesota MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

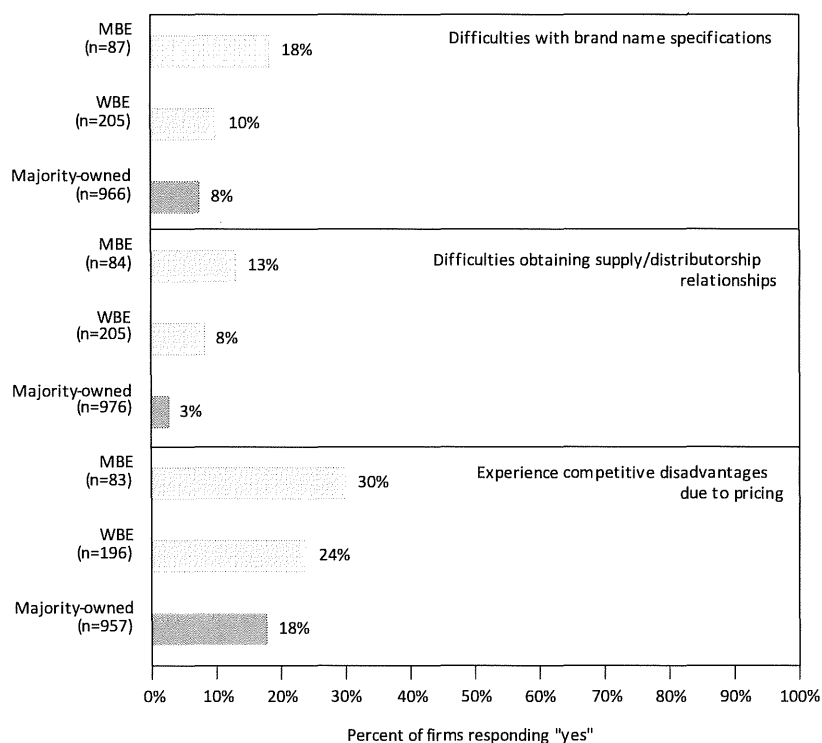
Source: Keen Independent Research from 2017 availability interviews.

Additionally, the survey asked construction firms if they experienced difficulties with brand name specifications on contracts as well as distributorship relationships, as shown in Figure H-31.

- Relatively more MBE construction businesses (18%) indicated difficulties with brand name specifications than majority-owned firms (8%). About 10 percent of WBEs reported this difficulty.
- MBE construction firms (13%) were more likely to report difficulties obtaining supply or distributorship relationships compared with WBEs (8%) and majority-owned firms (3%).
- Relatively more MBE and WBE construction firms also reported they experienced competitive disadvantages due to the pricing they receive from their suppliers.

Figure H-31.

Responses to availability interview questions concerning brand name specifications and distributorship relationships, Minnesota MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

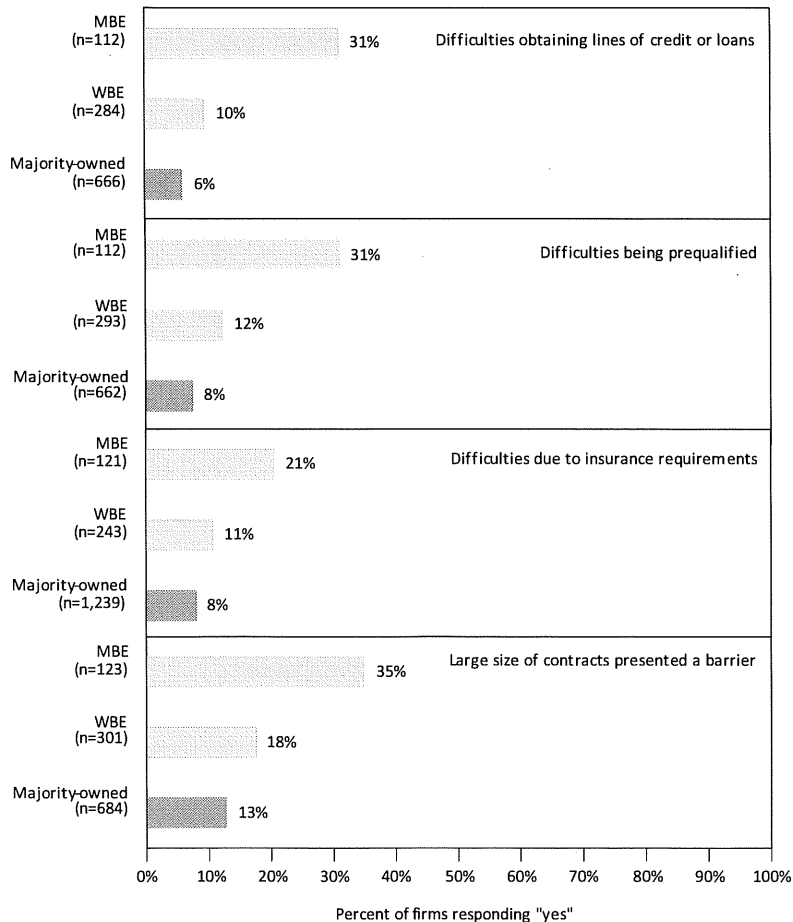
Source: Keen Independent Research from 2017 availability interviews.

**Professional services.** The study team asked similar questions about marketplace barriers in the availability interviews with professional services firms.

- Relatively more MBEs (31%) and WBEs (10%) reported difficulties obtaining lines of credit or loans than majority-owned firms (6%).
- More MBEs and WBEs reported difficulties being prequalified and difficulties due to insurance requirements.
- MBEs (35%) and WBEs (18%) were more likely to report large project size as a barrier compared with majority-owned firms (13%).

Figure H-32.

Responses to availability interview questions concerning loans, prequalification, insurance and size of projects, Minnesota MBE, WBE and majority-owned professional services firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

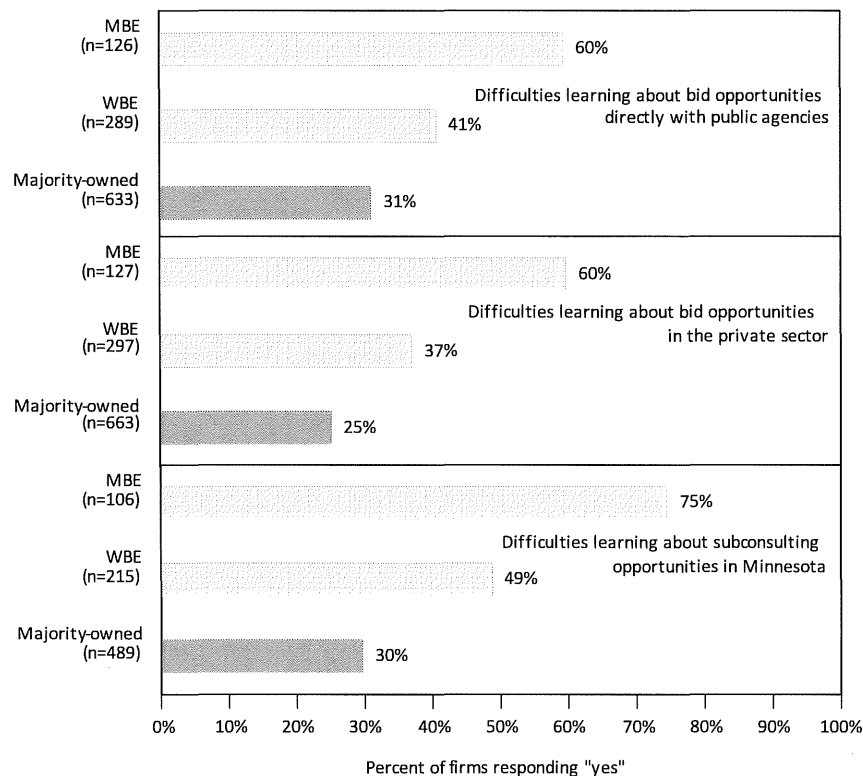
Source: Keen Independent Research from 2017 availability interviews.

Compared with majority-owned firms, a larger proportion of MBE and WBE professional services firms reported difficulties learning about bid opportunities with Minnesota public agencies, prime contractors and with private sector customers.

- For example, 60 percent of MBEs and 41 percent of WBEs indicated difficulties learning about bid opportunities directly with public agencies compared with 31 percent of majority-owned firms.
- As shown in Figure H-33, results for the question about difficulties learning about public sector opportunities were similar to responses when firms were asked about learning about opportunities in the private sector.
- Compared with majority-owned firms, MBE and WBE professional services firms were much more likely to report difficulties learning about subconsulting opportunities.

Figure H-33.

Responses to availability interview questions concerning learning about work, Minnesota MBE, WBE and majority-owned professional services firms



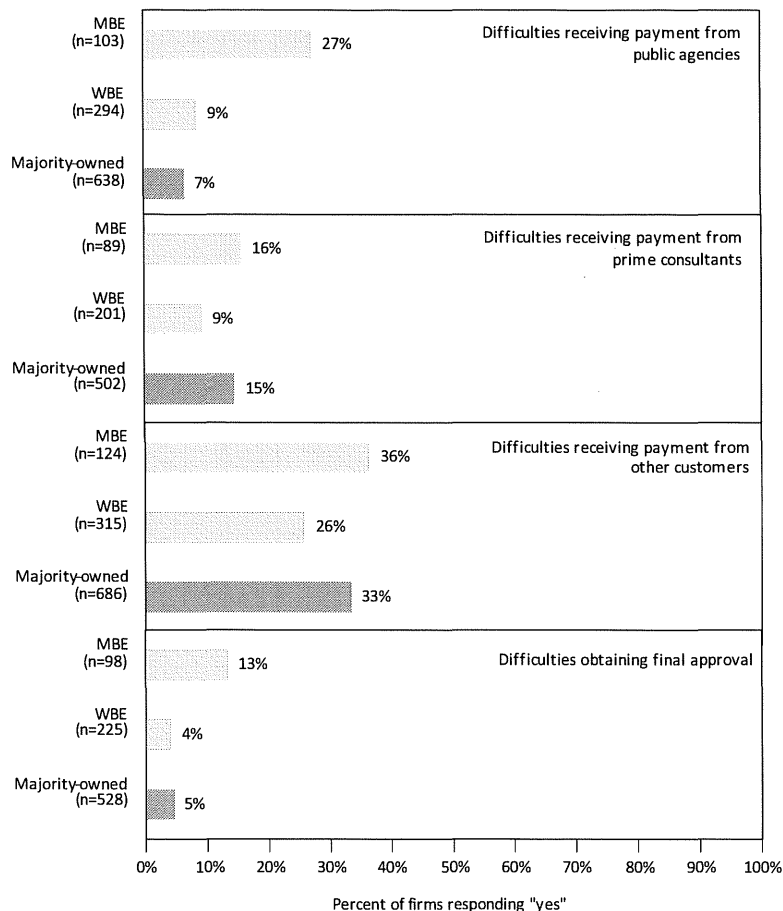
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2017 availability interviews.

About one-quarter of MBE professional firms reported difficulties receiving payment from public agencies, a higher percentage than found for WBEs (9%) and majority-owned firms (7%). About 13 percent of MBEs said that they had difficulty obtaining final approvals on work, also higher than WBEs (4%) and majority-owned professional services firms (5%).

Figure H-34.

Responses to availability interview questions concerning receipt of payments and approval of work, Minnesota MBE, WBE and majority-owned professional services 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 2017 availability interviews.

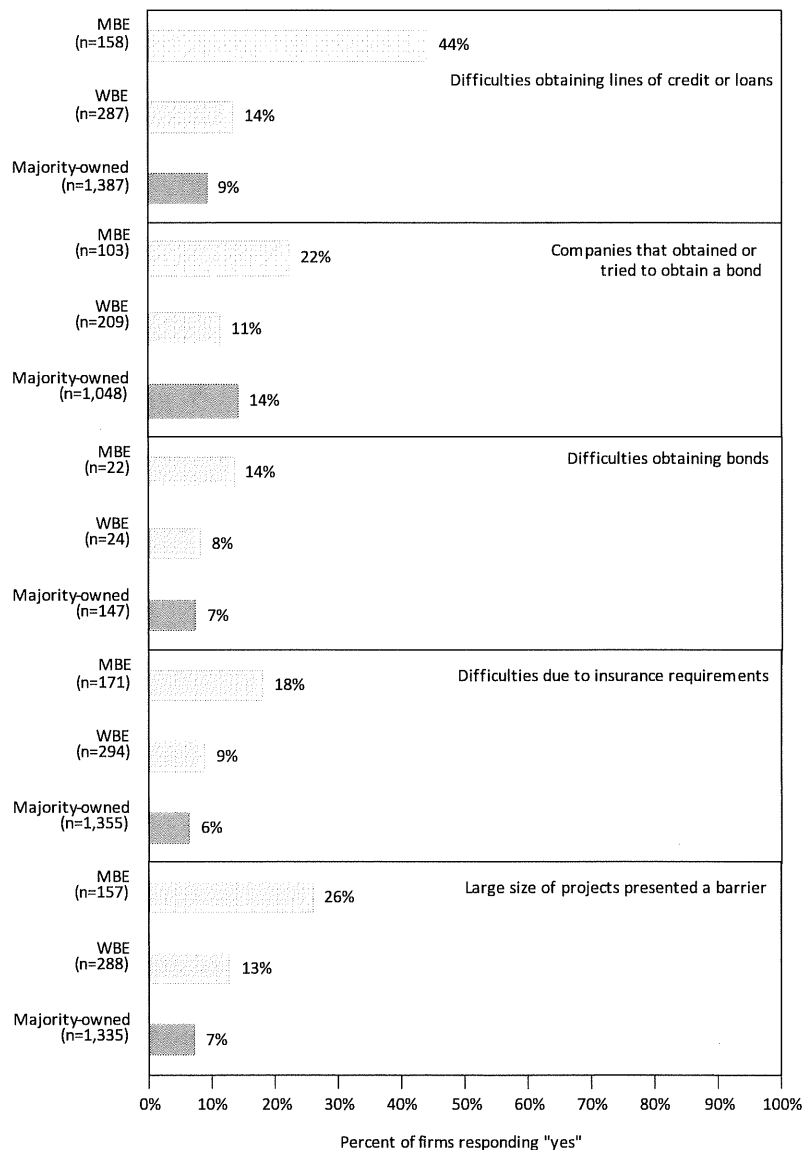
**Goods and other services.** Because goods and other services firms were asked similar questions about marketplace barriers in the availability interview, and due to a limited number of responses for MBEs for these industries, Keen Independent combined results for Minnesota goods and other services firms in the following graphs.

As with construction and professional services, Keen Independent examined any difficulties in obtaining lines of credit or loans for goods and other services firms. Figure H-35 provides these results.

- Relatively more MBEs (44%) reported difficulties obtaining lines of credit or loans than WBE (14%) majority-owned goods and services firms (9%). Among firms that had tried to obtain a bond, relatively few reported difficulties.
- More MBEs (18%) than WBEs (9%) and majority-owned firms (6%) reported difficulties due to insurance requirements. MBEs (26%) and WBEs (13%) were more likely to report large project size as a barrier compared with majority-owned firms (7%).

Figure H-35.

Responses to availability interview questions concerning loans, bonding, insurance and size of projects, Minnesota MBE, WBE and majority-owned goods and other services firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

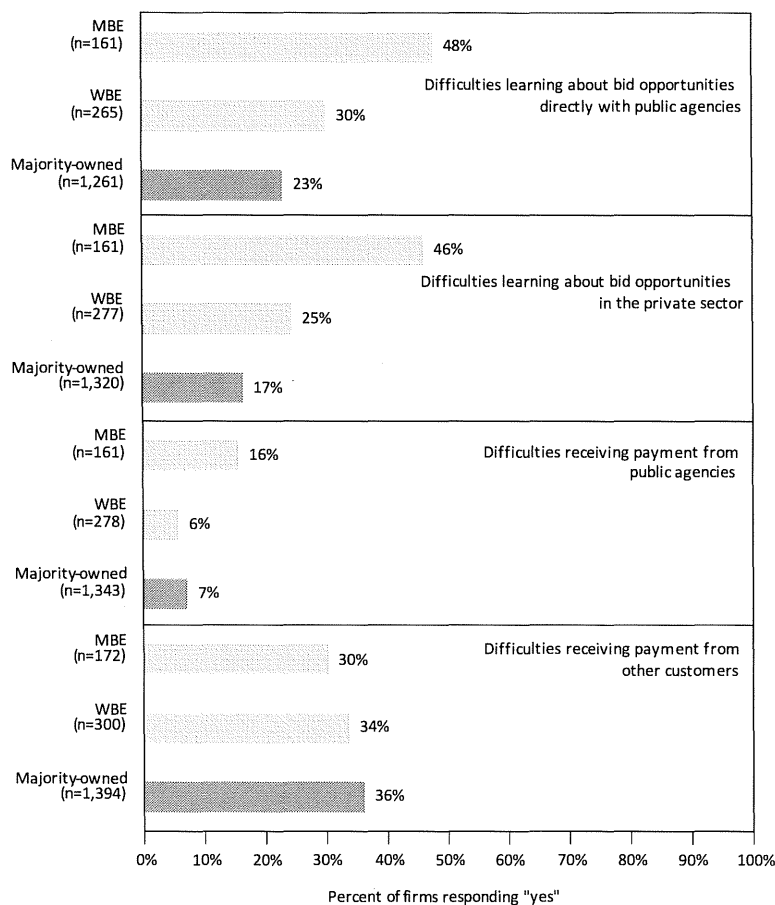
Source: Keen Independent Research from 2017 availability interviews.

As in other industries, goods and other services firms also asked about any difficulties learning about bid opportunities and receiving payment. Figure H-36 presents these results.

- As found for construction and professional services firms, a larger proportion of MBE and WBE goods and other services firms reported difficulties learning about bid opportunities with public agencies and in the private sector.
- When asked about difficulties receiving payment from public agencies, relatively few goods and other services firms reported problems. Somewhat more MBEs (16%) than WBEs and majority-owned firms indicated difficulties.

Figure H-36.

Responses to availability interview questions concerning learning about work and barriers to bidding, Minnesota MBE, WBE and majority-owned goods and other services firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

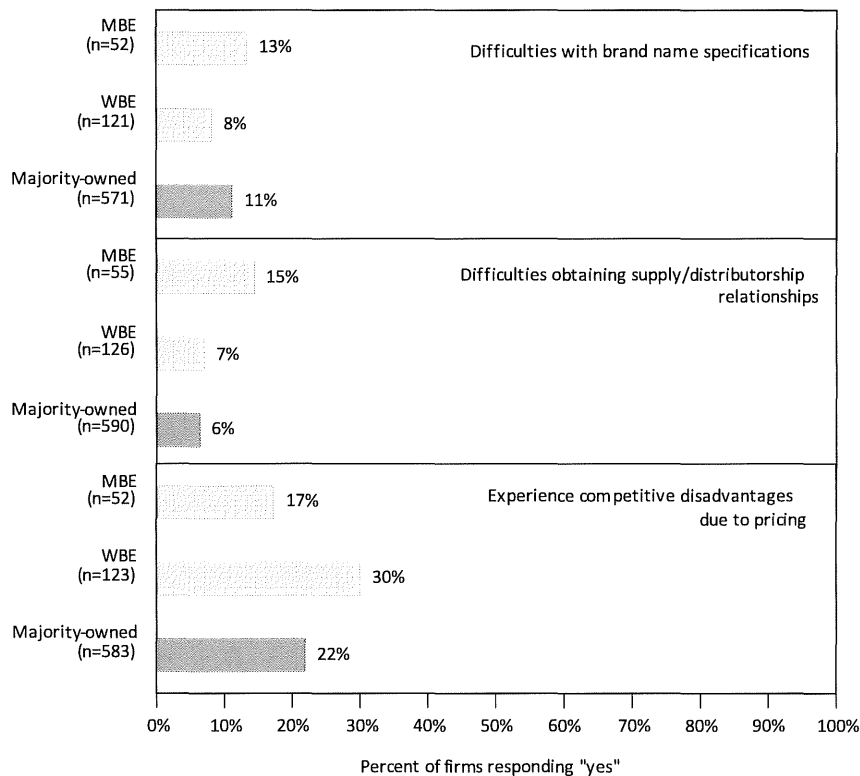
Source: Keen Independent Research from 2017 availability interviews.

Goods firms were further asked about brand name specifications, obtaining supply relationships and experiencing disadvantages related to pricing.

- Relatively few WBEs and majority-owned goods companies reported experiencing difficulties regarding brand name specifications or obtaining supply relationships. About 13 percent of MBEs reported such difficulties.
- About one-fifth of companies surveyed reported experiencing competitive disadvantages due to supplier pricing.

Figure H-37.

Responses to availability interview questions concerning brand name specifications and distributorship relationships, Minnesota MBE, WBE and majority-owned goods 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 2017 availability interviews.



## Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions and contractions. That study found that, between 2002 and 2006, 29 percent of non-publicly held U.S. businesses had expanded their employment, 24 percent had contracted their employment and 30 percent had closed. In Minnesota:

- Among the racial/ethnic groups examined, Hispanic American-owned firms in all industries were the most likely to close and the least likely to expand.
- African American-owned businesses were more likely to close and more likely to expand than white-owned businesses.
- Asian American-owned businesses were more likely to close and contract than non-Hispanic white firms.

The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses.

- Analysis of 2012 data indicated that, in Minnesota, average receipts for minority-, Hispanic- and women-owned businesses were lower compared to those of white-, non-Hispanic and male-owned businesses in the study industries.
- Data from 2011-2015 ACS indicated that, in Minnesota:
  - Female business owners earned less than male business owners in all study industries;
  - Minority-owned businesses earned less than majority-owned businesses in the construction and professional services industries; and
  - Veteran business owners and business owners with disabilities earned less than non-veteran and all other business owners in the construction and goods industries.
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant effects of gender on business earnings. After statistically controlling for certain gender-neutral factors, being female was associated with lower business earnings in Minnesota in all study industries in 2011 through 2015.
- Data from availability surveys conducted for this study showed that, across the construction, professional services, goods and other services industries in Minnesota, MBEs and WBEs were more likely to be low-revenue firms compared with majority-owned firms. MBEs and WBEs were also less likely to have annual revenue of \$15 million or more.

There was some evidence that MBEs have somewhat lower bid capacity than other firms after controlling for subindustry.

Answers to questions concerning marketplace barriers in the availability survey indicated the relatively more MBEs and WBEs than majority-owned firms face the following barriers:

- Access to business loans and lines of credit;
- Being prequalified for work (among professional services firms);
- Insurance requirements (among professional services firms);
- Large project sizes;
- Learning about bid opportunities in the public and private sectors, and with prime contractors;
- Obtain supplier/distributorship relationships (construction firms); and
- Competitive disadvantages due to pricing from suppliers (construction firms).

Relatively more MBEs than other firms reported difficulties concerning:

- Obtaining bonding (among construction firms);
- Insurance requirements on projects (among construction, goods and other services firms);
- Being prequalified for work (among construction firms);
- Receiving payment from public agencies;
- Receiving final approval on work;
- Brand name specifications; and
- Obtaining supplier and distributorship relationships (goods firms).

In summary, analysis of many different data sources and measures indicates evidence of disparities in marketplace outcomes and barriers for minority- and women-owned businesses in Minnesota.

## **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 2011-2015 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; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

#### **U.S. Census Bureau PUMS Data**

Focusing on the construction, professional services, goods and other services industries the study team used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.<sup>1</sup> For the analyses contained in this report, the study team used the 2011-2015 five-year ACS sample.

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<sup>1</sup> Ruggles, S., Genadek, K., Goeken, R., Grover J., & Sobek, M. Integrated Public Use Microdata Series: Version 6.0 [Machine-readable database]. Minneapolis: University of Minnesota, 2015.

**2011-2015 ACS.** The study team examined 2011-2015 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.<sup>2</sup> Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). Currently, these surveys cover roughly 1 percent of the population per year. The 2011-2015 ACS five-year estimates represent average characteristics over the five-year period of time, and correspond to roughly 5 percent of the population. For the Minnesota market area, the 2011-2015 ACS dataset includes 279,633 observations which — according to person-level weights — represent 5,524,756 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 one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual’s race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified multiple races was placed in the reported race category with the highest ranking in the study team’s ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as “Korean,” that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as “Korean” in combination with “Black,” the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Native Hawaiian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

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<sup>2</sup> 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](https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf).

- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani and Sri Lankan. Individuals who identified themselves as “Asian,” but who were not clearly categorized as Subcontinent Asian, were placed in the Asian-Pacific American group.
- American Indian, Alaska Native and Latin American Indian groups were considered Native American.
- If an individual was identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals identified as “other race” or “white and other race” were categorized as “other minority.”

**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.<sup>3</sup>

**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 household 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 2011-2015 ACS, home value is a continuous variable (rounded to the nearest \$1,000) and median estimation is straightforward.

**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.

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<sup>3</sup> 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.

Figure I-1.  
Class of worker variable  
code in the 2011-2015 ACS

Source:  
BBC Research & Consulting from  
the IPUMS program:  
<http://usa.ipums.org/usa/>.

| Description                     | 2011-2015 ACS<br>CLASSWKRD codes |
|---------------------------------|----------------------------------|
| N/A                             | 0                                |
| Self-employed, not incorporated | 13                               |
| Self-employed, incorporated     | 14                               |
| Wage/salary, private            | 22                               |
| Wage/salary at nonprofit        | 23                               |
| Federal government employee     | 25                               |
| State government employee       | 27                               |
| Local government employee       | 28                               |
| Unpaid family worker            | 29                               |

**Business earnings.** The study team used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners aged 16 and over with positive earnings in the analyses.

**Study industries.** The marketplace analyses focus on four industries: construction, professional services, goods and other services. 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.

2011-2015 Census industry codes used for construction, professional services, goods and other services

| Study industry        | 2011-2015<br>ACS IND codes   | Description  |
|-----------------------|--|--|
| Construction          | 0770   | Construction industry  |
| Professional services | 7290, 7390, 7470,<br>7460, 7380, 6695,<br>8180, 7490   | Architectural, engineering and related services; Management, scientific and technical consulting services; Advertising, public relations and related services; Scientific research and development services; Computer systems design and related services; Data processing, hosting and related services; Other health care services; Other professional, scientific and technical services.   |
| Goods                 | 0470, 2290, 2570,<br>4070-4590; 4670,<br>4680, 4690, 4770,<br>4795, 4870, 4880,<br>4890, 5070, 5480,<br>5680 | Nonmetallic mineral mining and quarrying; Industrial and miscellaneous chemicals; Cement, concrete, lime and gypsum product manufacturing; Wholesale trade; Retail trade: automobile dealers, other motor vehicle dealers, automotive parts, accessories and tire stores, furniture and home furnishings, electronics stores, building material and supplies dealers, hardware stores, lawn and garden equipment and supplies stores, pharmacies and drug stores, office supplies and stationery stores, fuel dealers. |
| Other services        | 1990, 6170, 6380,<br>7580, 7590, 7680,<br>7690, 7770, 7780,<br>7790, 8770, 8790,<br>8870                     | Printing and related support activities; Truck transportation; Couriers and messengers; Employment services; Business support services; Investigation and security services; Services to buildings and dwellings; Landscaping services; Other administrative and other support services; Waste management and remediation services; Automotive repair and maintenance; Electronic and precision equipment repair and maintenance; Commercial and industrial machinery and equipment repair and maintenance.            |

**Industry occupations.** The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2011-2015 ACS OCC codes used in the study team's analyses.

Figure I-3.

2011-2015 ACS occupation codes used to examine workers in construction

| <b>2011-2015 ACS<br/>occupational<br/>title and code</b>  | <b>Job description</b>  |
|---|---|
| <b>Construction managers</b><br>2011-15 Code: 220   | Plan, direct, coordinate or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.   |
| <b>First-line supervisors of<br/>construction trades and<br/>extraction workers</b><br>2011-15 Code: 6200 | Directly supervise and coordinate the activities of construction or extraction workers.   |
| <b>Brickmasons, blockmasons<br/>and stonemasons</b><br>2011-15 Code: 6220                                 | Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block and terra-cotta block. Construct or repair walls, partitions, arches, sewers and other structures. Build stone structures, such as piers, walls and abutments, and lay walks, curbstones or special types of masonry for vats, tanks and floors.   |
| <b>Carpenters</b><br>2011-15 Code: 6230   | Construct, erect, install or repair structures and fixtures made of wood, such as concrete forms, building frameworks, including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.  |
| <b>Carpet, floor, and tile<br/>installers and finishers</b><br>2011-15 Code: 6240                         | Apply shock-absorbing, sound-deadening or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings and roof decks.  |
| <b>Cement masons, concrete<br/>finishers and terrazzo<br/>workers</b><br>2011-15 Code: 6250               | Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways and cabinet fixtures.  |
| <b>Construction laborers</b><br>2011-15 Code: 6260  | Perform tasks involving physical labor at building, highway and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades." |
| <b>Paving, surfacing and<br/>tamping equipment<br/>operators</b><br>2011-15 Code: 6300                    | Operate equipment used for applying concrete, asphalt or other materials to road beds, parking lots or airport runways and taxiways, or equipment used for tamping gravel, dirt or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators and stone spreader operators.  |



Figure I-3. (continued)

2011-2015 ACS occupation codes used to examine workers in construction

| <b>2011-2015 ACS<br/>occupational<br/>title and code</b>   | <b>Job description</b>  |
|--|---|
| <b>Miscellaneous construction<br/>equipment operators,<br/>including pile-driver<br/>operators</b><br>2011-15 Code: 6320 | Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors or front-end loaders to excavate, move and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads or locomotive cranes to drive pilings for retaining walls, bulkheads and foundations of structures, such as buildings, bridges and piers. |
| <b>Drywall installers, ceiling tile<br/>installers and tapers</b><br>2011-15 Code: 6330                                  | Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.  |
| <b>Electricians</b><br>2011-15 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. Exclude "Security and Fire Alarm Systems Installers."  |
| <b>Glaziers</b><br>2011-15 Code: 6360  | Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings and tabletops.  |
| <b>Painters, construction and<br/>maintenance</b><br>2011-15 Code: 6420  | Paint walls, equipment, buildings, bridges and other structural surfaces, using brushes, rollers and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.  |
| <b>Pipelayers, plumbers,<br/>pipefitters and steamfitters</b><br>2011-15 Code: 6440                                      | Lay pipe for storm or sanitation sewers, drains and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe or seal joints. Excludes "Welders, Cutters, Solderers and Brazers." Assemble, install, alter and repair pipelines or pipe systems that carry water, steam, air or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.                                     |
| <b>Plasterers and stucco<br/>masons</b><br>2011-15 Code: 6460  | Apply interior or exterior plaster, cement, stucco or similar materials and set ornamental plaster.   |
| <b>Roofers</b><br>2011-15 Code: 6515   | Cover roofs of structures with shingles, slate, asphalt, aluminum and wood. Spray roofs, sidings and walls with material to bind, seal, insulate or soundproof sections of structures.  |
| <b>Iron and steel workers,<br/>including reinforcing iron<br/>and rebar workers</b><br>2011-15 Code: 6530                | <i>Iron and steel workers</i> raise, place and unite iron or steel girders, columns and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. <i>Reinforcing iron and rebar workers</i> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches and hand tools. Include rod busters.       |
| <b>Helpers, construction trades</b><br>2011-15 Code: 6600  | All construction trades helpers not listed separately.  |

Figure I-3. (continued)

2011-2015 ACS occupation codes used to examine workers in construction

| 2011-2015 ACS<br>occupational<br>title and code                               | Job description  |
|---|--|
| <b>Driver/sales workers and truck drivers</b><br>2011-15 Code: 9130           | <i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock or materials in liquid, loose or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude "Couriers and Messengers." |
| <b>Crane and tower operators</b><br>2011-15 Code: 9510                        | Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."   |
| <b>Dredge, excavating and loading machine operators</b><br>2011-15 Code: 9520 | <i>Dredge operators</i> operate dredge to remove sand, gravel or other materials from lakes, rivers or streams; and to excavate and maintain navigable channels in waterways. <i>Excavating and loading machine and dragline operators</i> operate or tend machinery equipped with scoops, shovels or buckets to excavate and load loose materials. <i>Loading machine operators, underground mining</i> operate underground loading machines to load coal, ore or rock into shuttles or mine cars or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scrapers or scoops, or machines equipped with gathering arms and conveyors.  |

Source: BBC Research & Consulting from the IPUMS program: <http://usa.ipums.org/usa/>.

## Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, professional services, goods and other services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as 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 Americans, Hispanic Americans, Native Americans or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories in Minnesota 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, Native Americans and whites;
- Ethnic groups — Hispanic Americans and non-Hispanics; and
- Gender groups — men and women.

### **Home Mortgage Disclosure Act (HMDA) Data**

The study team analyzed mortgage lending in Minnesota 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 2015 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$36 million for 2007 and \$40 million for 2011), 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 loan denial rates and subprime lending rates for different racial and ethnic groups in 2007, 2011 and 2015. 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, Surveys, Focus Groups, Public Forums and Other Comments**

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. It is based on input from 2,480 businesses, trade association representatives and others.

Appendix J includes 12 parts:

- A. Introduction and Methodology describes the process for gathering and analyzing the information summarized in Appendix J.
- B. Background on the Firm and Industry summarizes information about how businesses, organizations and agencies become established and how companies change over time.
- C. Whether There Is a Level Playing Field for Minority- And Women-owned Businesses Overall discusses challenges not faced by other businesses.
- D. Any Unfair Treatment or Disadvantages Specific to Minority-owned Businesses provides comments on whether there is a level playing field for minority-owned businesses operating in the Minnesota marketplace.
- E. Any Unfair Treatment or Disadvantages Specific to Women-owned Businesses reports on whether there is a level playing field for women-owned businesses in the Minnesota marketplace.
- F. Any Unfair Treatment or Disadvantages Specific to Small Businesses provides insights into any barriers in the Minnesota marketplace specific to business size.
- G. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Businesses Owned by Persons with Disabilities reports on any barriers to operating a business in the Minnesota marketplace.
- H. Any Unfair Treatment, unfavorable work environment or Disadvantages Specific to Veteran-owned Businesses describes any challenges faced when operating a business in the Minnesota marketplace.
- I. Working with One or More of the Participating Entities summarizes experiences businesses have while working with the participating entities and their insights into contractor/subcontractor relationships.
- J. Insights Regarding Business Assistance Programs and Certification provides information on business owners and representatives awareness and perceptions of business assistance programs and certification opportunities.

- K. Any Other Insights and Recommendations for the Participating Entities summarizes businesses' comments regarding the effectiveness of state-wide contracting processes or programs.
- L. Input from Public Comment Period for the Draft Report synthesizes public comments received after the release of the draft Disparity Study report (January–February 2018).

## **A. Introduction and Methodology**

The Keen Independent study team conducted in-depth personal interviews and telephone, online and fax availability interviews from spring 2017 through fall 2017. The Minnesota Department of Administration (Admin) held two public forums in August 2016 and asked for verbal and written comments concerning the 2017 Minnesota Joint Disparity Study. Attendance including 54 representatives of businesses as well as 12 representatives of the public entities. Of these, 32 commented at the public forum (including 31 spoken comments, one written comment card).

Keen Independent collected additional public input through the study website, telephone hotline, study email addresses, mail and other means. After the release of the draft Disparity Study report for public comment in January 2018, the study team received 31 public comments. The majority of these were collected from in-person input and comment cards from five February 2018 public forums. Keen Independent also reviewed input from listening sessions hosted by the City of Minneapolis and MnDOT and Keen Independent's presentation to the Construction Partnering Program at the Associated General Contractors of Minnesota offices.

Through in-depth personal interviews, availability interviews, public forums and public comment process, business owners and managers had the opportunity to discuss their experiences working in construction, professional services, goods and other services; experiences working with participating entities and others; perceptions of certification programs; and other topics important to them.

**In-depth personal interviews.** The study team conducted in-depth personal interviews and focus groups with 110 businesses, trade associations and others representing construction, professional services, goods and other services in Minnesota. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local marketplace, business assistance programs and certifications; the contracting and procurement policies, practices, and procedures; and other topics. Interviews and focus groups were conducted by the Keen Independent and other study team members:

- CJ Petersen & Associates LLC (CJ Petersen), a St. Paul-based market research and planning firm;
- Felton Financial Forensics and Valuation LLC (Felton Financial Forensics), an Edina-based CPA firm;
- Fondungallah & Kigham LLC, a St. Paul-based law firm focused on local issues of immigration, employment and discrimination; and
- KLD Consulting (KLD), a Minneapolis-based communications and public policy consulting firm.

Interviewees included individuals representing construction, professional services, goods and other services businesses, trade associations and representatives of public entities in Minnesota.

The study team identified businesses for in-depth interviews primarily from the respondents to the availability survey of companies across the state. The final question in the availability interview was whether the respondent would be willing to participate in a follow-up interview. Keen Independent grouped availability survey respondents willing to participate in those interviews by business type, location, and the race, ethnicity and gender of business owner.

Interviews also included veteran-owned businesses (9) and representatives of businesses owned by persons with disabilities (8), which Keen Independent primarily identified from certification records.

The study team conducted most of the interviews with the owner, president, chief executive officer, or other executive of the business or trade association.

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could readily identify interviewees or other individuals or businesses that were mentioned in the interviews. The study team reports whether each interviewee represents a certified business and also reports the race/ethnicity and gender of the business owner, when possible. Business interviewees are identified in Appendix J by interviewee numbers (i.e., #I-1, #I-2, #I-3, etc.). Interviews with trade associations and other organizations are identified as “#TO.”

**Availability interviews.** The study team asked firm owners and managers to provide comments at the end of the online or telephone availability survey. Businesses were asked: “Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Minnesota?”

A total of 2,265 businesses provided comments. The study team analyzed responses to these questions and provided examples of different types of comments in Appendix J. Availability interview comments are referenced as “AI.”

**2017 public forums and other input.** Beginning in spring 2016, participating public entities made wide-ranging efforts to publicize the Disparity Study and opportunities for public input, including distribution of the information to individuals and organizations throughout the State. Admin also posted the public forum dates/locations on the study website.

On August 31, 2016, Admin held two public forums at the Minneapolis Central Library. Public forums included late afternoon and evening start times. Public forum comments are referenced in Appendix J as “PFP.”

**2017 focus groups.** In July 2017, Keen Independent moderated four one-hour focus groups including businesses, External Stakeholder Group members, and representatives of public agencies and other local leadership. A total of 27 participants joined the groups. Discussions focused on topics similar to the public forum list above. Focus group participants are identified in aggregate by group as “FG-1 through FG-4.”

**Written public comments received in 2017.** The study team received seven written comment submissions throughout the study period. Admin or Keen Independent, or both sent direct responses. Written comment requests for interviews were added to the potential interview list.

**Disparity Study hotline input received in 2017.** The study team also maintained a Disparity Study hotline phone number for additional input. Keen Independent received one call and responded to that caller.

**2018 public comment period.** The study team sought public input in January–February 2018 after the January 29, 2018 release of the draft Disparity Study report. Input included in-person comments and comment cards from five public forums and three listening sessions in February in Minneapolis, Saint Paul, Rochester and Duluth, and via statewide webinar; and comments received through the study website, dedicated email address and telephone hotline.

## **B. Background on the Firm and Industry**

Interviewees reported on business histories. Part B summarizes information related to:

- Business start-up history;
- Challenges in starting a business and any barriers to business entry;
- Geographic scope and any changes over time;
- Type of work and changes over time;
- Business expansion or contraction over time;
- Size of contracts and any changes over time;
- Current economic conditions and other conditions in the marketplace;
- Prime-subcontractor relationships; and
- Keys to business success and factors that advantage one firm over another in their industry.

**Business start-up history.** Many interviewees representing construction, professional services, goods, and other services businesses in Minnesota reported that their companies were started (or purchased) by individuals with prior experience in their respective industries. Some larger firms acquired a number of small businesses during the course of their business history.

This information demonstrates that any race or gender barriers to entering and advancing within the Minnesota construction, professional services, goods and other services industries would affect the relative number of firms started by minorities and women in Minnesota.

Most firm owners worked in the industry, or a related industry, before starting their businesses.

[e.g., #I-4, #I-7, #I-10, #I-13, #I-16, #I-18a, #I-20, #I-21, #I-24, #I-26, #I-27, #I-27a, #I-29, #I-31, #I-32, #I-36, #I-37, #I-43, #I-44, #I-48, #I-49, #I-54, #I-55, #I-61, #I-63, #I-66]

Before launching their firms, many business owners had worked in the industry or had acquired some first-hand knowledge from family members working in related industries, for example:

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm reported that before starting his own firm, he had worked for another firm in a similar industry. [#I-19]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported that his partner and he hold related professional degrees and bought the firm in 2013. [#I-67]
- A white female owner of a certified (WBE, DBE, TGB, MUCB, SUBP) specialty contracting firm reported that she had worked in the industry for five years before getting her license and going into business for herself. [#I-23]
- A Subcontinent Asian American male representative of a Subcontinent Asian American- owned MBE-certified professional services firm reported that the owner had the experience to work as an IT professional and that he realized that there were opportunities in MN for the services he could provide. [#I-54]
- The white male person with disabilities owning a TGB- and CERT-certified specialty contracting firm indicated having worked for his father at an early age and “grew up in the business.” [#I-12]
- A white male veteran owner of a professional services firm reported that he started his career in professional services while in the military and continued to practice in the private sector when he left the service. [#I-3]
- An African American female owner of a goods and services firm reported that her parents started a business in the United States after fleeing their home country. She added that when her parents decided to move back overseas, she took over the family business. [#I-58]
- The owner of a VO-/SBE- certified specialty services firm reported that he was inspired to start the business because his father “worked with a company ... that does the same thing and I found out that they’re doing pretty well. [#I-11]
- An African American male owner of a CERT-/TGB-certified specialty contracting firm reported that he was trained as an engineer in Africa. He added that he worked with a friend in the construction industry before starting his own firm. [#I-40]
- A white male owner of a VO-certified specialty contracting firm reported that he had 20 years of experience in the industry prior to opening his current firm. [#I-9]



- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm reported, “We’re a family-owned business, my dad started it ... I came into the business, learned it from the ‘ground-up’ and took over as acting CEO. My father retired permanently ... and I have been running it myself since.” [#I-30]
- A white female owner of a specialty contracting firm stated that she used to manage the financials for her now-ex-husband, as he did the same type of work. When they divorced, she needed to earn her own income, so she purchased the equipment she needed to go off on her own. [#I-59]

Some business owners reported buying companies or investing in companies where they had previously worked. These interviewees included, for example:

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported that after working for years for the family business, she bought the firm from her father. She explained, “I’ve been working here ... full-time as a paid employee for fifteen years, and I purchased the company two years ago.” [#I-45]
- The white representative of a veteran-owned engineering firm reported that he had worked for the former owners before buying into the firm. He stated, “I moved back up here ... and bought into the company and became one of the owners and I’ve been slowly accumulating more stock ....” [#I-1]
- A white male owner of a specialty contracting firm reported, “I couldn’t find a job in 1981. I worked for the guy [who] owned the business. [He was] sick of dealing with the public, so I bought it from him.” [#I-57]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm reported that she bought the firm from another woman owner who needed an influx of cash. [#I-44]

**Challenges in starting a business and any barriers to business entry.** Business owners and representatives reported on any difficulties they faced at start-up. For some of those firms, challenges persist today.

Some business owners and representatives reported, as barriers, little knowledge of basic business operations at start-up, and limited mentoring opportunities, when needed, once the business was up and running. These included:

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP), when asked about the challenges she faced when she took over the business stated, “It’s a lot .... You do not know what you do not know .... You have to have a good banker, a good insurance agent, a good lawyer and ... bonding company [and CPA]. So really, building a team ... that I really trusted to ... be experts in those areas [was a challenge].” [#I-45]

- The white female owner of a DBE-WBE- SBE-, TGB- certified professional services firm reported that they “started from scratch” and “everything was a challenge” such as “TT” and “licensing and payroll.” [#I-48]
- A male representative of a minority immigrant business association commented that members tend to be quite forward thinking, but they lack the information to move forward, and then cannot get ahead. He said that people do not know where to go to get the necessary information. He said that the members are very interested in pursuing the “American Dream,” yet there is still a lack of information as to how to do so. [#TO-5]
- Regarding challenges to starting businesses, the Asian-Pacific American male representative of an immigrant business association stated that many of the member businesses underestimated the challenges of business ownership at first. He continued, “We need to create a forum that can help people [with their] businesses .... [We need to] work with those who want to get licensed, and work to contact resources from the city level to the state.” [#TO-11]
- A white female owner of a TGB/CERT/ WBE-certified specialty contracting firm reported, “It took a year ... to feel really comfortable with the systems on the technical aspect of it, because it was totally an unknown for me.” She went on to say, “I started from the bottom up ....” [#I-30]
- An African American part owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm stated, “We did not have good financial knowledge about running a business. These challenges continue to this day. It affected us in obtaining proper financials for running the business.” [#I-38]
- The white woman owner of a certified (WBE, DBE, SBE, CERT, TGB, MCUB, SUBP) professional services firm commented, “I’m not sure where to start; some of [the barriers] were logistical to find out all of the information we needed to know to start our business. It was a challenge to know that we would not have enough income for a while and to make that work for a while... to save... From the date we decided to try it, to when we left our other jobs ... it was two years ... it was the phone, the computer, the communications, the accounting system, finding clients.” [#I-39]
- An African American part owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm indicated, “The biggest challenge was knowledge about business. We lacked ‘business acumen’ that involves the right people, prioritizing business issues and finances ... hiring the right people and identifying when it was time to separate.” [#I-38]
- The African American owner of a TGB/CERT-certified specialty contracting firm commented that learning about the overall structure of the business was difficult for him. [#I-13]

- For an African American owner of a TGB/CERT/MBE/SBE/DBE-certified specialty service provider trying to sustain his firm, “the ... industry is really growing but there are no mentors ....” [#I-19]
- The white female owner of a WBE- DBE-certified specialty contracting firm conveyed that getting started after a business acquisition was a challenge as she had to learn the “correct procedures.” She indicated that the original business owner was “far behind the times ... not billing properly, some things weren’t computerized ....” [#I-34]
- A white male representative of a white women-owned specialty contracting firm commented that basic bookkeeping is “very overwhelming” for small businesses while also managing employees and producing work. He also said, “The challenges ... [were] learning how to run a business ... I wish I would [have] had at least two years of business [management experience] beforehand.” [#I-31]
- The white female owner of a WBE- DBE-certified specialty contracting firm said, “The big one was just setting up my computer [and] learning my numbers. That was a big part of it, [figuring out] if I’m going to make money or not.” [#I-56]

Many business owners or representatives faced early barriers securing start-up capital or financing. For some, financial barriers persisted. [e.g., #I-14, #I-23, #I-40, #I-49, #TO-2] Examples of comments included, for instance:

- The African American male owner of a (MBE, SBE, TGB, DBE, SBE, CERT) specialty contracting firm said, “It really boils down to access to capital.” [#I-63]
- A white male owner of a VO-certified specialty contracting firm reported the expected challenge of “initial cash layout” to get the business started. [#I-9]
- An African American president of a workforce trade organization commented regarding access to capital, that obtaining capital is challenging in the construction industry for new firms. He stated that “lending practices are still exclusionary ... they won’t give black folks a loan.” He added that the lowest paid employee in a bank is making decisions “about the person across the table.” [#TO-6]
- The representative of an Asian-Pacific American goods firm reported that small business lending typically did not apply to “micro businesses.” He added, that micro businesses “just [need] a little help.” [#AI-2229]
- A Hispanic American male owner of an MBE/DBE/MUCB/CERT/TGB-certified professional services firm reported financing as a barrier to start-up and beyond. He added that he could understand why so many businesses “register and fail.” [#I-43]
- The white female owner of a specialty contracting firm, commented that when applying for financing to purchase a truck was told by the financiers, “Look at you ... you’re really ‘gonna’ do this?” [#I-59]

- The African American partial owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm reported, “When we needed dollars, as a small company there were challenges ... as a minority. Banks weren’t willing to provide financing; my perception that they weren’t willing to provide financing as [we were not] majority-owned.” He added that financing has not been a key to success for his firm; it has been “a challenge.” [#I-38]
- An African American president of a minority immigrant organization reported “capital” as one of many barriers to industry entry. [#TO-7]
- One white female owner of a goods and services firm serving persons with disabilities reported trouble obtaining a loan when she first wanted to start the business. [#I-60]

She went on to explain that although she owned a house, she was a single female under 30 with limited collateral. She stated that banks turned her down for a loan “over and over, and over again.” She added, “The best they could do [was] give me credit cards and the interest rate was 23 percent ... and I said, ‘No.’” [#I-60]

- An African American owner of a MBE-certified professional services firm, when asked about the challenges of starting a business, “Like any start-up, one of the initial challenges is just coming up with the ... initial finances to be able to hire and pay employees and [to] be able to get the necessary equipment ....” [#I-16]
- The white female owner of a DBE- WBE-certified specialty contracting firm on the topic of financing commented, “It’s tough ... you [have] to pay your guys, pay your bills and then there’s not much left ....” She added, “You [have] to be willing to tighten up and be lean yourself.” [#I-56]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider reported not being able to secure funds for equipment saying, “I had to be able to purchase a vehicle and equipment .... I had a hard time finding money to do so.” He concluded that, “The cost of being able to ... get start-up equipment was horrendous, we couldn’t... find the money anywhere.” [#I-19]
- The African American male owner of a specialty services firm stated that for businesses to “strive and succeed,” they must have “the funds [to do so].” He continued, “Most of the minorities, based on my knowledge ... don’t have [enough financing] to start the business in the first place. So, that is a big factor that is really impeding their progress of making a substantial impact in the industry.” [#I-20]
- A white male person with disabilities owning a TGB/CERT-certified specialty contracting firm commented that he faced financing and bonding challenges “in the beginning ....” He said, “You have to have money to buy equipment and pay employees ... we are a union company, so it’s not cheap ....” [#I-12]

- The white male veteran with disabilities owning a specialty service business commented, “Money is a big thing when you start a business,” He added, “... but it’s just ... the school of hard knocks.” He indicated getting by being “pretty self-sufficient.” [#I-26]
- The African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm reported, “You always have financial barriers ....” [#I-22]
- A female African American representative of a specialty professional services firm remarked that for small businesses to compete and grow they need funds. She remarked that start-ups can find help, but financial assistance for growth is non-existent. [PFP#9]

In response to their limited access to business financing, some business owners relied solely on use of personal funds or the remortgage of private homes to support the business and make payroll. Examples included:

- A focus group participant from a public entity reported that she was aware of small business owners using their primary residence as collateral to “make payroll.” She added that was “scary,” as both their businesses and personal finances were at risk of failure. [#FG-1]
- Another focus group participant from a public entity added that business owners, with financing limitations, also guaranteed bonds with their house as collateral. [#FG-1]
- An African American female owner of a specialty services firm stated, “I only ever use my ‘personal resources’ ... I never consider borrowing ....” [#I-24]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider remarked that he had not acquired financing when starting his business. He said, “No, we’ve done it the hard way. We have not had financing .... We had our first line of credit less than a year ago.” [#I-19]

A male representative of a minority immigrant business association reported on specific cultural nuances that made securing financing more difficult for immigrant business owners and those from some faith-based cultures. He stated that financing is particularly challenging for immigrants from faith-based cultures that disapprove of loans secured with interest. He explained there are not enough banks that accommodate cultural differences in lending practices. [#TO-5]

One white male owner of a specialty contracting firm reported early barriers to financing that have since diminished along with growth in equity and assets. He said, “[I] had to get the financing [and] the money, [which was challenging].” When asked if financing was still a challenge for his business, he responded, “I have enough equity and assets and things like that .... So, I don’t have problems getting loans [because] I have good credit and money, and income.” [#I-57]

Building a name, “reputation and references” were challenges, for some emerging businesses. For example, a Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm indicated that references were very important for “opening doors” for his line of business. He conveyed that being “new in the business” is a challenge due to the need to establish one’s reputation and references. [#I-42]

Others reported challenges to “getting a foot in the door” to build relationships, network and grow their businesses. [e.g., #I-14, #I-18, #I-40, #I-42] For example:

- Regarding building relationships, one focus group participant reported that businesses need to “build a relationship beforehand.” This participant added, “If done at the time of bid, it’s too late.” [#FG-2]

Another focus group participant from a public sector entity reaffirmed, “It’s a relationship game; it’s not about the project itself ....” [#FG-2]

- The African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm remarked, “... in the construction industry ... it was difficult to kind of get your ‘foot in the door’ when you are ... starting off ....” [#I-22]
- An African American owner of a TGB/CERT-certified specialty contracting firm, when asked if there are any difficulties for women or minorities starting a business in his line of work, reported that “networking” was always difficult. He added that some women or minorities are made to feel “out of place” as they are often unrepresented when attending big meetings. [#I-13]
- An owner of a majority professional services firm indicated that breaking into the industry was a significant difficulty, saying, “What is affecting our ability to get work is ‘being at the table’ .... I’m not even sitting at the table.” [#I-14]
- The African American female owner of a specialty services firm reported that she lacked local networking connections at start-up. She stated, “[At first], my work was pretty limited.” She added, “I had gotten some interest ... in North Dakota ... but it was too hard for me at the time to travel.” Instead, with young children, this business owner indicated a barrier when trying to develop a local network “within a 25-mile radius of my home.” [#I-24]
- A white male veteran owner of a professional services firm conveyed that having moved cross-country, he faced difficulty starting his new practice. He stated that having left behind ten years of working relationships, the firm experienced a slow start to building new relationships to grow his business in the Minnesota marketplace. [#I-3]
- The white owner of a WBE-certified supply firm found relationship-building a challenge. She added that it did not happen “overnight ... it took years to build the right relationships.” [#I-25]

For some, specifically, building relationships with representatives of public entities was challenging. These comments included:

- New to Minnesota, the white woman co-owner of a WBE-, DBE-, TGB-certified professional services firm reported that even getting in on the “ground level was quite difficult” when seeking entry into public sector work. [#I-32]
- The African American male co-owner of a MBE-certified goods and services firm reported that he struggles to find a “point of contact” with public entities to discuss contract opportunities for the type of work his firm performs. [#I-62]
- A number of public forum participants commented on barriers to relationship building and accountability in the procurement process. An African American male representative of a DBE-certified goods firm remarked that he typically had positive experiences when working with “the leadership,” however, when he worked with the purchasing staff, he faced challenges. He indicated that “go[ing] over” the purchasing representative to the supervisor was not an option, as “retribution” could limit opportunities to sell his goods. [PFP#16]
- The white female owner of a DBE-certified specialty-contracting firm remarked that relationships created with diversity department representatives are overruled at the procurement level. She added that if a business owner goes over the head of a procurement representative, that owner faces the challenge of alienating someone she must work with in the field. [PFP#3]
- A white woman owner of a certified (WBE, DBE, SBE, CERT, TGB, MCUB, SUBP) professional services firm commented, “Because the State of Minnesota is so large and [has] so many departments, each of those different departments has its own personnel to talk to and [we don’t know] who within the organization we should follow-through [with] to obtain projects.” She added, “The challenge [for her] was to find out the pieces of the state government, to reach out to the departments, to find the list of people to talk to.” [#I-39]
- The white female with disabilities owning a professional services firm stated with regard to developing contacts and gaining entry to public sector, “I ... think there needs to be a separate process for promoting professional service contracts versus construction and trade contracts .... Every time I open up an email from the State of Minnesota, it’s about a construction job, and that’s of no interest to me.” [#I-50]
- The Hispanic American male owner of a professional services firm indicated a challenge to establishing a business in his line of work was that he does not know how to engage and build relationships with public entities and procure work. [#I-68]

When seeking opportunities to bid, some business owners indicated that finding customers and securing work were early and on-going challenges for them. Comments included:

- The African American female owning a MBE/WBE/SBE-certified professional services firm reported challenges at start-up that persisted: “Finding out where opportunities are. So initially it was word-of-mouth, a lot of my work was referral work but trying to find new opportunities I had challenges.” [#I-17]
- When asked about challenges, the white representative of a veteran-owned engineering firm commented, “Up here, there is a general lack of work unless you’ve got a particular niche.” [#I-1]
- The Hispanic American male owner of an MBE/DBE/MUCB/CERT/TGB-certified professional services firm reported that at start-up, despite experience, lack of name recognition made it difficult to get major projects. [#I-43]
- The white male owner of a specialty contracting firm reported, “The first and biggest challenge is getting customers, and finding customers and keeping customers.” [#I-51]
- The white female owner of a WBE-, DBE-, SBE-CERT-, TGB-certified professional services firm commented that keeping her staff busy was challenging. She said, “... the real challenge for me is finding enough work for my staff.” [#I-53]

Several minority- and women-owned businesses specifically reported difficulty securing work in the public sector in Minnesota. For instance:

- The African American female owning a MBE/WBE/SBE-certified professional services firm reported that securing work in the public sector was particularly challenging for a small businesses and minority- and women-owned businesses. [#I-17]
- The Asian-Pacific American male representative of an immigrant business association, when asked if he observed any barriers preventing member firms from entering the industry, reported that the businesses struggled to “tap into” city and state contracts. He added, “I think that a lot of them don’t know what to do or where to go to get that information.” [#TO-11]
- A representative of a majority professional services firm reported as a barrier, “Trying to network to get work in the public sector that’s similar to work we’ve previously in the private sector. It’s been difficult to break into the public sector as the “new” firm.” [#AI-1099]
- One white female owner of a WBE/DBE-certified specialty contracting firm remarked, “To be honest ... I have been bidding [public sector work] since I got the [certifications] and I haven’t gotten one job. So, my work is pretty much private [sector] work that I find.” [#I-56]



- An African American male co-owner of a MBE-certified goods and services firm reported, "When it originally opened up, probably the biggest challenges [were] learning about and finding out how to ... take advantage of the opportunities and where to be able to submit a proposal or ... any type of documentation to gain contracts with government [entities]." [#I-62]

He continued, "And that hasn't proven to get any easier for us. We frequently miss out on these contracts because we just don't know where or how to find them, or [we] are aware of them too late." [#I-62]

- The white woman partial owner of a WBE-, DBE-, TGB-certified professional services firm reported that the firm relocated from out-of-state. She stated that the recent move made it difficult to start over and break into jobs requiring DBE certification because those jobs are "not always policed very well." She reported submitting a proposal for at least ten jobs, but has not received an answer on any of them. She noted that part of the issue is the "lack of knowledge out there." [#I-32]
- Despite being "the only minority-owned firm in his industry," an African American owner of a TGB/CERT-certified specialty contracting firm, reported finding "opportunities to bid" particularly challenging. [#I-13]
- An African American owner of a MBE-certified professional services firm stated, "With the State of Minnesota, we're registered into their procurement, so we get notifications of any requests that go out for services. With the other entities, we don't have registration or a means to see when they have any opportunities out there .... Not knowing what they have, or what they're looking for, is difficult for us." [#I-16]
- A representative of a majority contracting firm conveyed that breaking into sizeable work in public sector was a barrier. He reported an "unwillingness of State or other publicly-funded organizations to consider new vendors and publicly-bid services totaling over \$25, 000 per year." [#AI-189]

One business owner reported being a low bidder on a public sector project, then being told by the entity that his firm was undersized for the project. This white male person with disabilities owning an SBE-certified professional services firm said, "I can get work 'outside' of the Twin Cities, but can't get work 'inside' the Twin Cities. In fact, how I got a City of Saint Paul [specified] project is that I was low [bidder]." [#I-10]

He continued, "They interviewed me ... and later called me and said, 'You're qualified, but you're too small [for the project] and we're not going to give it to you .... but [we] have this other [smaller]one.'" He added that the smaller project awarded was "a mess." He reported that his company has not worked within the Twin Cities since. [#I-10]

The small “size” of some businesses created barriers to securing work and breaking into the industry, for some business owners. For example:

- The white woman owner of a certified (WBE, DBE, SBE, CERT, TGB, MCUB, SUBP) professional services firm reported, “The biggest one is that you’re ‘so small’ there are only a certain level of projects that people will be willing to give you. To get going and grow you need a bit larger projects. We have to verify for them we can actually do the work with just two people.” [#I-39]
- An African American male owner of a MBE-certified professional services firm indicated that small firm size was a barrier, saying, “When you’re not a bigger firm, you do have limitations .... You can’t [perform work] beyond your size.” [#I-16]
- The white female owner of a DBE-WBE- SBE-, TGB- certified professional services firm reported her firm experiences barriers related to their small size. She commented, “... it’s about perception of our size.” [#I-48]

Some business owners and representatives indicated that competition was challenging. For most of these firms, competition from “larger” firms put their small businesses or minority- and women-owned firms at a disadvantage. Additionally, a public forum participant reported the “daunting” impacts of competition on growing a business in Minnesota. [e.g., #I-50, #I-64] Examples included:

- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT-, TGB-certified professional services firm reported, “Probably one of the biggest challenges is competing for projects against companies that are larger than us. Because we’re a smaller agency, we don’t have the business development resources that a lot of other larger agencies like ours have.” [#I-52]
- He continued, “I’d probably say the area that we’re in is highly competitive. It seems that it gets more and more competitive every year.” [#I-52]
- The African American male owner of a special services firm commented, “There are a lot of challenges ... ‘challenges of competition’ .... It’s not that easy to penetrate into the [industry].” [#I-20]
  - A female African American representative of a specialty professional services firm commented that that challenges exist for small firms competing for MAC projects. She indicated that competing for kiosk opportunities at the airport was “daunting.” [PFP#9]
  - The Subcontinent Asian American male representative of a Subcontinent Asian American male owned MBE-certified professional services firm said, “I believe that we live in a very competitive world; we can get lost in this business world ... there are bigger companies that we compete with ... we cannot get the recognition as a service provider .... Every day is a challenge for us to keep on filling the gap for our customers.” [#I-54]

- The white male owner of a goods firm commented, "... [In his industry] there is a lot of competition in the Minneapolis area ...so if [you] were to start [a business,] you'd be in an uphill battle." [#I-69]
- A white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT-, TGB-certified professional services firm, when asked about disadvantages for small businesses in his field, he stated, "Probably the biggest disadvantage we have is when [we have to compete against] larger [firms] that have a lot more people, a lot more resources [and] that may be national. It is kind of hard to compete against them because they have just bigger portfolios and stuff like that .... Sometimes it's hard to compete against those bigger companies." [#I-52]

Some other small business owners and minority- and women-owned firms reported challenges with advertising and marketing as barriers to business start-up and growth. Those comments included, for instance:

- The white female Executive Director of a non-profit women's service organization reported that it is necessary for small businesses and minority- and women-owned firms to market through social media and websites. She indicated that some of these firms are at a disadvantage since they do not have websites to market their firms. [#TO-3]
- A Hispanic American male owner of a professional services firm reported developing awareness of the business and getting the name "out there" as challenges. [#I-68]
- Regarding challenges, the white female owner of a WBE/DBE/SBE/CERT/TGB-certified professional services firm remarked that marketing is a challenge. She reported, "...I have had to become more assertive and aggressive as a marketer ...." She added, "... really put 'myself out there,' just more or less asking for work ...." [#I-53]
- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT-, TGB-certified professional services firm reported, "... [a challenge] is probably just [building] brand awareness for our agency, and trying to get that word out to our target market as to who we are and what we do." [#I-52]
- A white female owner of a goods and services firm serving persons with disabilities reported that as a home-based business, the challenge when starting the business was 'being recognized ....' She conveyed, "Our biggest challenge at the 'very first' [as a home-based business] was being 'recognized as a business' ...." [#I-60]

She added that in the last year, additional challenges arose because Google did not know where to place the business even though the firms' "hub" is the Twin Cities." [#I-60]

For many businesses, short- and long-term challenges included ongoing difficulty locating qualified workers. [e.g., #I-18, #I-57, #I-63, #I-65, #AI-51, #AI-59, #AI-95, #AI-254, #AI-414, #AI-777, #AI-937] Many business owners and representatives commented that small businesses confronted barriers when recruiting, training and retaining qualified employees, for instance:

- An African American male owner of a MBE-certified professional services firm stated that “getting the right employees [or] contractors” is challenging. [#I-16]
- An Asian American female owner of a DBE-certified specialty-contracting firm stated she faces challenges related to the hiring pool. She commented that students coming out of trade schools are not ready to work in her industry. [PFP#19]

She added that small business owners must spend money training ill-qualified employees, who “move to larger firms once trained,” affecting overall profits. She suggested that small businesses should receive government assistance while they are providing on-the-job-training to lesser qualified graduates from trade schools. [PFP#19]

- A white male owner of a specialty contracting firm reported, “It’s harder than heck to find employees. I don’t know what they’re doing wrong in the high school system, [but] people [aren’t] on time and dependable [to] work. It’s pathetic [when trying] to find employees.” [#I-57]
- The African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm reported, “Manpower would be the biggest barrier.” [#I-22]
- The white male representative of a white woman-owned DBE-, WBE-certified specialty services firm reported that the business has consistently struggled with hiring drivers. The interviewee attributed this to pay scale, as the wages paid to truckers are lower than the wages paid to those in other skilled trades. [#I-46]
- A Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm commented that finding people with the right skill sets for the sector that they work in is challenging. [#I-42]
- For a white representative of a veteran-owned engineering firm, finding trained staff was a barrier. He indicated that it was a challenge to successfully organize the company with enough trained staff to market and complete work. [#I-1]
- The representative of a majority construction firm reported not having enough trained staff to fill his trucks, “We have a lot of equipment that isn’t filled with trained operators.” [#AI-2205]
- An African American owner of a TGB/CERT-certified specialty contracting firm commented that finding trained employees was a continued challenge. [#I-13]

- The African American owner of a TGB/CERT/MBE/SBE/DBE-certified specialty service provider mentioned challenges in hiring a diverse workforce. He said, “It’s hard to get a diverse workforce for what we do, so mainly our workforce is ‘African American,’ which has now paid dividends for us.” [#I-19]
- A Native American male representative of a non-profit minority education and training association commented, “There will be actually a labor shortage in the state or Minnesota by the year 2020.” [#TO-8]
- For a rapidly growing majority construction business, the representative indicated, “Given our recent rapid growth, we’re only currently working through the process for equal opportunity employment ....” [#AI-2157]
- A Native American female owner of a closed construction firm who now owns a professional services firm said, “Okay, I think ... it is hard for employers in ... Minnesota to trust that there is a legitimate employment pool. So, I think there’s ... a lack of understanding because our employment pool sure has become more diverse. There is a lack of understanding about how to meet the needs of diverse employees. And [it’s] not just racially diverse, but [also] religiously, socioeconomically [and] even geographically.” [#I-61]
- One business owner reported on the need for quality control as staffing pressures increased. This white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported, “I’m sure you’ve read about labor shortages, and that’s real .... What we are seeing is that there is quality control that needs to happen. Because as people are scrambling to provide labor for their projects, they are hiring people who are less skilled [and] less experienced. And so, we have to watch ... the projects [with a close eye] so that the work that’s being done is up to [the] quality that [we] require.” [#I-45]
- Also related to staffing, unexpected business interruptions, such as ill health and equipment failures, disadvantaged some small business owners when compared to larger firms with greater staff resources and cross-training. For example, a white female owner of a specialty contracting firm stated, “I do everything.” This included, she reported, doing the company books, paying taxes, purchasing fuel and performing maintenance. She added that when she had surgery it was a hardship for her small business explaining that she missed four months of work. [#I-59]

Many business owners and representatives discussed issues related to bureaucratic regulations, tax filing and licensing and other regulations that made conducting business a challenge. Heavy “paperwork” was an added barrier reported, by some. For instance:

- A white female owner of a certified (DBE, WBE, TGB, CERT) professional services firm reported that it is challenging that “you need to wade through” bureaucracy to obtain public contracts. [#I-47]

- A male representative of a minority immigrant business association reported that in East Africa, business is not standardized and is not as regulated as business is in the United States. This cultural difference made opening and operating a business a challenge, for some immigrant business owners. [#TO-5]
- A white male representative of a white women-owned specialty contracting firm commented that his trade is “highly regulated,” and that he was “quite overwhelmed” at start-up. [#I-31]
- A white male owner of a specialty contracting firm reported as barriers to running a business, “... understanding and knowing what regulations [there are] once you start getting employees, and ... understanding the regulations of filing taxes and all the other things that go along with running a business.” [#I-51]
- The Hispanic American male owner of a professional services firm reported that the amount of “paperwork” involved with starting a business in Minnesota is challenging. [#I-68]
- A male representative of a minority immigrant business association reported that barriers to business ownership for minority immigrants existed, but were difficult to prove. He indicated, for example, that if a business license is denied to an immigrant business owner, that business owner often misinterpreted business licensing protocols. He added that most members did not know the “do’s and don’ts” for getting a business up and running and complying with government regulations. He explained that those businesses then violated many codes and were shut down immediately because of their lack of information. [#TO-5]
- An African American representative of a specialty construction firm reported that lack of information disadvantaged his minority-owned firm. He reported, “Lack of information. If the information is easily accessible, we would be able to expand, but since it isn’t, we gain information from friends and it is difficult.” [#AI-159]
- The white male owner of a specialty contracting firm reported that state licensing requirements were restrictive. He commented that keeping up with the bureaucracy of tax codes, industry codebooks, “conflicting codebooks” and licensing is challenging. [#I-36]

He added that the City of Minneapolis alone requires five to 10 different licenses for the individual and the firm performing work in his industry. He further reported that the State of Minnesota informed him of a new commercial-maintenance labor tax halfway through the year and expected him to collect it retroactively, for example. [#I-36]

Some business owners and representatives reported that business registration, licensing and permitting was a challenge. [e.g., #AI -66, #AI-892, #AI-#AI-735, 906, #AI-1069] Examples follow:

- The white male owner of a SDVOSB-certified specialty contracting firm reported wait time for “registering your LLC with the State” as a barrier to conducting business. [#I-6]
- A Hispanic American owner of a closed specialty contracting firm reported that he was not registered with the State of Minnesota when he bought his four semis, which resulted in financial and personal difficulties. He reported that ultimately, he lost his business. [#I-41]
- The Hispanic American representative of a Latino leadership organization conveyed that recent immigrant business owners face difficulties securing “the same kind of licensure they had in their native countries.” He added, “I work [with professional services careers] to get that level of licensure and accreditation to be able to be employed in the United States, you have that challenge .... Then you’ve got the challenge of language ... the professional language that they would need that licensure.” [#TO-2]
- An African American representative of a minority-owned professional services firm reported, “The [professional] license is too complicated and has a lot of information. It makes it very difficult” to succeed. [#AI-98]
- The white female attorney representing a chamber of commerce reported that member start-ups faced challenges with permits and licensing required of municipalities. She gave an example of a firm that wanted to open downtown, but struggled with building permits required to put a few chairs in the alley next to the business. [#TO-1]

A white female representative of an SBE-certified majority-owned construction firm reported on electronic payrolls as a major barrier for small businesses. She indicated, “The one thing that I really ... can’t comprehend why [MnDOT and others] did this, but when they started doing electronic payrolls a lot of the small businesses and a lot of the minorities ... already can’t handle the paperwork, and so now you add on this over-burdensome LCP [tracker] ... [and] CLMR system that MnDOT [used].” She added, “That’s been very burdensome to a lot of the contractors.” [#I-35]

She added, “... the MnDOT system ... after you figure out their system it literally takes 15 minutes per employee, per project per week, to enter the data into their system. And so, these [firms] that are smaller entities, that are doing the work out in the field plus needing to come back, do payroll, do their bookkeeping, plus adding all of this ... is too cumbersome. And so, there’s a lot of people that are just like, ‘Forget it, I’m done.’” Getting to the reason it’s an issue that disproportionately impacts smaller businesses, she noted, “Bigger [businesses] will get a [computer] program to do it ... the minimum [program cost] that we found is about \$10,000.” She concluded, “I’m hoping and I’m praying every night that [the MnDOT system] never goes to the county levels.” [#I-35]

Many other business owners and representatives reported challenges with insurance and other operational barriers to conducting business. [e.g., #I-21, #I-41, #I-49, #TO-9] For instance:

- An African American female owner of a specialty services firm serving persons with disabilities reported that she was unable to secure the necessary insurance that her firm needed. She remarked that in addition to the high cost, finding an insurance company willing to work with her was impossible. She concluded that lack of insurance limited her ability to perform work in Minnesota. [#I-55]
- A white female owner of a DBE-certified professional services firm commented at a public forum that, in public sector, professional liability requirements were excessive and arbitrary. [PFP#25]
- The African American female owner of a specialty services firm indicated that securing general liability insurance was a barrier for her firm. She stated, “Insurance ... I think that’s pretty big. Because I have been so small, it was not something that I have ... sought out to do, because it feels like an expense that I do not have the capacity for at this time ....” [#I-24]
- A white male owner of a SDVOSB-certified specialty contracting firm reported that the process to acquire insurance took time. He said, “It is a long waiting game when you’re starting a business, waiting on everything to come in ... insurance ....” [#I-6]
- The white female representative of a woman-owned professional services firm said, “As a single woman entrepreneur in consulting services ... the insurance and documentation ... can be daunting. Many times, these ... are a barrier to entry. [#I-15]
- The Subcontinent Asian American owner of a professional services firm reported that specialty insurance was one of the biggest challenges to starting the business. He added that he wondered if the business could survive without insurance. [#I-28]
- A white male representative of a white woman-owned CERT-certified specialty contracting firm indicated being “shocked” at public entities’ and others’ specifications for consultant insurance. He stated that the required insurance was too costly and a “burden” for businesses. [#I-37]
- The African American female owning a MBE/WBE/SBE-certified professional services firm reported, “Sometimes looking at public projects the insurance requirements are pretty steep.” She continued, “Small firms can’t even get insurance to meet the insurance liability requirements.” She then commented that the challenge was “initially getting the capacity to get those insurance requirements but also sustaining that over a long period of time.” [#I-17]
- The white male director of a non-profit trade association commented on the challenge for small businesses when securing adequate insurance. He stated that business owner do not always recognize that they “... have to understand and have good professional help when getting insurance.” [#TO-4A]



A few business owners found that, once their firms were up and running, maintaining independence and avoiding acquisition was a challenge, when competitors were larger businesses or “national players.” Comments included:

- A white female co-owner of a WBE-certified goods firm reported difficulty in “Maintaining yourself as a small, independent [business] .... Many of our smaller competitors have been acquired by other people and so ... they can leverage a different set of resources across many different companies, ... trying to maintain yourself as a small business in a competitive industry like this is ... not easy.” [#I-27A]
- The white male representative of a Hispanic American-owned MBE-, DBE, SBE-, MCUB-, SUBP- TGB-, CERT-certified professional services firm identified growing competition from “national players” with “deeper pockets and deep staff” as a challenge for small businesses. Despite the firm’s resistance, he added that this company felt the pressure of large national firms interested in acquiring the firm. [#I-29]

For several business owners and representatives, getting into business was not challenging. [e.g., #I-5, #I-8, #I-71] Some of those business owners bought established businesses or had business contacts from previous positions that made client development easier. For example:

- The male Hispanic American part owner of a Hispanic American woman-owned marketing firm reported facing no challenges at start-up, however, she indicated that “the market is changing.” [#I-5]
- The white male representative of a white woman-owned CERT-certified specialty contracting firm indicated that he has not experienced barriers as he was already in the industry before the owner started the business so she was able to keep contracts and references, however, getting new clients was more challenging. [#I-37]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm indicated that since they bought an established company with an established reputation in the industry, the firm already had established clients who stayed with the company after its sale. He commented that he was lucky for not having had a “start-up business.” [#I-67]

Some business owners and representatives reported barriers to industry entry specific to race, gender and ethnicity, and for some, limited access to quality training. For example:

- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider said, “I am one of only two African Americans in the whole of United States that I know of that’s nationally certified to do what I do.” He remarked, “There’s a lot of private work that we don’t get because ... we’re not white.” [#I-19]

- A Native American female owner of a closed construction firm, who now owns a professional services firm, when asked what challenges she faced starting the construction company and her consulting firm, said, “Actually, the challenges are similar. It has to do with credibility .... For a while, I thought when I had my construction company, that I was not really explaining the capabilities of my company very well. Then I realized after ... working on it for a good, solid year ... that that did not matter. Being ‘a woman and being Native [American],’ I ran into implicit bias constantly.” [#I-61]

This Native American female owner added that “implicit bias” on part of clients and other contractors as a barrier to entry into any industry for minorities and women. [#I-61]

- The African American president of a non-profit trade association commented that there are barriers that are more “subtle.” He stated, “We see some cases ... a lack of willingness to collaborate, a lack of willingness to provide ... to fully inform [MBEs] of ... information, credit lines, limitations ....” [#TO-9]
- The white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting firm, commented, “Being female [in her industry] is a big challenge.” [#I-23]
- A Native American male representative of a non-profit minority education and training association noted challenges for Native Americans trying to acquire the skillset needed for business ownership and entry into many industries. He added, “They don’t possess the requisite skillsets ... to [move] onboard into the economy.” [#TO-8]

People of color who are immigrants may face additional barriers for both entry and ownership. Interviewees who discussed these barriers included, for example:

- An African American president of a minority immigrant organization reported that access to authority, being minority and having an accent are all barriers to industry entry. [#TO-7]
- The Subcontinent Asian American male representative of a minority-owned goods firm reported, as a barrier for the business owners, entry into and comfort with the United States business culture. He also said that getting used to the language is a barrier for the owners. [#I-66]
- A Hispanic American representative of a Latino leadership organization said, “We focus mainly with the Latino population and immigrants ... especially recently arrived immigrants.” He added, “The primary challenge is in language.” He added that, for the professional industries he serves, “It’s not just basic ESL English, it’s technical terms, products, materials that they use here in their profession.” [#TO-2]

- The African American male owner of a specialty services firm expressed concern for minority business owners needing “language assistance” for industry entry and business ownership. He said, “The biggest thing that the State can do to help people, especially the minorities [who] may not have the ability to find ... information, is to set up something [to] help with business, like a dedicated department [that’s] multilingual with ... the ability to actually go somewhere and talk to someone.” [#I-70]

**Geographic scope and any changes over time.** Business owners and representatives reported on where they conduct business and if they have expanded their territories.

Some business owners and representatives reported limiting their territory for conducting work. [#I-2, #I-13, #I-16, #I-18, #I-20, #I-22, #I-24, #I-34, #I-46, I-52, #I-59] For instance:

- A Hispanic American representative of a Latino leadership organization reported that members primarily work in the Twin Cities area. [#TO-2]
- A male representative of a minority immigrant business association reported that the members generally seek opportunities in the Twin Cities and Rochester. [#TO-5]
- A white female owner of a WBE- DBE-certified specialty contracting firm reported that her firm works in southern Minnesota. When asked if she plans to expand the firm’s territory, the same business owner said, “I don’t want to travel. I do not want to put guys up in hotels ... it puts them too far away from a shop if something goes wrong.” She continued, “I know there [are] companies out there that ... go anywhere, but your liability increases [and] your costs increase, so it just doesn’t make sense.” [#I-56]
- The Asian-Pacific American male representative of an immigrant business association reported that member firms mainly perform work in the Twin Cities, Rochester and Marshall areas. [#TO-11]
- An African American female owning a MBE-, SBE-, WBE-certified professional services firm reported that she did business “in the Twin Cities.” She reported, “... if you have an office just in Minneapolis ... then there’s traveling involved ... to do a project in a location.” [#I-17]

Some business owners and representatives reported working in many different regions of the state, and sometimes outside the state. [e.g., #I-1, #I-6, #I-21, #I-27, #I-33, #I-38, #I-39, #I-42, #I-43, #I-57, #I-60, #I-64, #TO-4A, #TO-9] For example:

- The owner of a majority professional services firm reported that he works “with the big companies ... so across the state is where the big companies are located.” He also works in other states and outside the United States. [#I-14]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported primarily working statewide and in Canada. [#I-67]

- A white male owner of a supply firm reported they perform work in Minnesota, North Dakota and South Dakota. [#I-8]
- The white female representative of a white male-owned professional services firm reported that the firm works in Minnesota, Canada and across the United States. [#I-15]
- A white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm reported, “We work anywhere in the State of Minnesota.” She went on to say that the company had jobs in Hawaii and Wyoming, and commented, “We’ll basically go anywhere [to work].” [#I-44]
- One business owner reported conducting most of the firm’s work outside Minnesota, because as a non-union company, the firm was often excluded from doing some work within the Minnesota. [#I-19]
- The Subcontinent Asian American male representative of a minority-owned goods firm noted that his customers are all over the United States. He indicated that the firm does about 50 percent of its business in Minnesota. He said that the company expanded outside of the region due to word-of-mouth and because people they used to work with started companies outside of Minnesota. [#I-66]
- An African American male owner of a CERT/TGB-certified specialty contracting firm reported, “We work in the entire Metro Area. We have thought about expanding beyond the Metro [Area]. We have worked in Rochester and Mankato and Orono.” [#I-40]
- The white male representative of a white women-owned specialty contracting firm indicated that his firm works mainly conducted business in the northwestern Minnesota. He said, “Generally, we work within 45 miles of our shop .... Now, we do take on some jobs within four or five hours that are really higher end jobs that are for ... loyal customers.” [#I-31]

A few business owners reported expanding and then contracting territories over time. For instance, comments included:

- The white male veteran with disabilities owning a specialty service business indicated that his firm worked “primarily in the seven-county area.” He added, “We have worked up in northern Minnesota a few years ago, which we don’t do anymore.” [#I-26]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported that her firm mostly performs work in the Metropolitan Area. She went on to say, “We’ve done projects in Wisconsin and northern Minnesota. In terms of quality control, I like to be able to visit ... any job site as needed, [so] it’s a quality control decision [to not do statewide work].” [#I-45]

- A white male veteran owner of a professional services firm reported that the company conducts projects all over Minnesota, as well as in several other states. He noted that while the firm was licensed in 15 other states, but since the recession they have let several licenses lapse because they were no longer getting work in those states. [#I-3]

**Type of work and changes over time.** Business owners and representatives discussed the types of work that their firms perform.

Many interviewees reported that their companies were specialized and primarily conducted one type or only a few types of work product or services. Some trade associations interviewed reported members with specialty focuses, as well. [e.g., #I-3, #I-10, #I-14, #I-18, #I-22, #I-35, #I-48, #I-54, #I-56, #I-68, #TO-3, #TO-4, #TO-8, #TO-11] Comments included:

- The white male representative of a white women-owned WBE/DBE-certified specialty contracting firm commented that the firm primarily provides a very specialized type of work for the construction industry. [#I-46]
- The African American male owner of a CERT/TGB-certified specialty contracting firm commented that although the firm performed in several trades, it specialized in one of those trade most often. [#I-40]
- The Hispanic American male part owner of a Hispanic American woman-owned professional services reported that the firm provides specialized work in her field. [#I-5]
- A white male owner of a VO-certified specialty contracting firm reported that he is in specialty manufacturing. [#I-9]
- A white male owner of a supply firm reported providing goods serving persons with disabilities. [#I-8]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider reported conducting a specialized type of environmental work. [#I-19]
- A Native American male representative of a MBE-certified goods and services firm reported providing very specialized technical services. [#I-33]

Some interviewees reported work in a number of different fields. [e.g., #I-57, #TO-5] For example:

- The white male veteran with disabilities owning a specialty service business indicated, “We do a little bit of everything,” “It’s pretty broad .... It’s basically [specialty] outside things.” [#I-26]
- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm stated, “[We do] commercial contracting ... specialty contracting ....” She added that the firm also serves as a regional distributor of specialty systems and works in three business segments. [#I-30]

- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT-, TGB-certified professional services firm mentioned that he had envisioned a firm based mostly on [specialty] engineering, but that they are doing more work in construction and inspection. During winter slowdown, he indicated that the firm moves to mostly design work. [#I-43]
- The Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm indicated that his business does mostly contract IT work with the state and many agencies within the federal government. He said they get many different types of contracts and that his business has an average of one-to-ten contractors per project. [#I-42]

For a number of business owners and representatives interviewed work types stayed constant. These interviewees included:

- The white male owner of a goods firm said that his firm performs fabrication of specialty goods. When asked if there have been any changes over time to the type of work his firm performs, he commented, “No, I think it’s been pretty much the same.” [#I-69]
- A white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty goods and contracting firm reported, “We are a fabrication shop, so that is what we do. We put together all kinds of [specialty goods].” [#I-44]
- The white male owner of a SDVOSB-certified specialty contracting firm reported that his firm’s work stays constant in construction-related inspection and quality control. [#I-6]

Many business owners and representatives interviewed reported having expanded their work types over time; some based these decisions on profitability and availability of opportunities. Comments included:

- The Subcontinent Asian American male representative of a minority-owned goods firm reported that in order to remain competitive with “overseas” production, the firm has expanded its product line. [#I-66]
- The white male owner of a specialty goods firm reported seasonal products delivery. When asked if the type of work his firm performs has evolved over time, the same business owner reported, “Certainly there’s change in any industry, but we’ve pretty much been one of the leaders in much of that change ....” [#I-51]
- The African American owner of a MBE-certified specialty contracting firm indicated that he had started his business offering one service then expanded with another service over time. [#I-21]

- The white female owner of a CERT-certified specialty services firm reported that the firm has changed to meet marketplace demands to keep up with the changes in her industry. [#I-64]
- The male representative of a white woman-owned WBE- certified professional services firm reported that one of the male part owners started the firm and the business initially started out as a specialty consulting company. He added that the business has since grown to provide a wide range of technical services. [#I-72]
- The Subcontinent Asian American owner of a professional services firm said in his industry, the work is always changing. [#I-28]
- The white owner of a WBE-certified supply firm noted that she began by selling only two office-related product lines “where I have six now.” [#I-25]

The same owner reported, “We’ve had to reinvent ourselves several times along the way as our industry ...” to increase overall profitability. [#I-25]

- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT/TGB-certified professional services firm that caters “mostly to government ... markets” reported the need to change, “It’s kind of important to try and stay ahead ... stay on top of what those changes are, because those changes ... impact how companies are selling and promoting their products and services.” [#I-52]

He continued, “We continually have to look for additional services or additional solutions to offer our customers. So, it’s [an] evolving market that we’re in.” [#I-52]

- The African American male owner of a specialty services firm, that changed services on-demand, reported, “If you ask us to [conduct specialty management] for you ... if you want to [conduct specialty contracting], we’re willing to do [those things] for you.” [#I-20]
- An African American owner of a MBE-certified professional services said that his firm has to look for ways to stay relevant and commented, “That’s the biggest challenge, just making sure you’re not just stuck on one area. [You have to] expand your portfolio.” [#I-16]

**Public or private sector, or both, and preferences/experiences in each.** Most business owners and representatives reported conducting work in both public and private sectors. Only some reported exclusively working in public sector or exclusively in the private sector.

Most business owners and representatives interviewed reported working in both sectors.

Several industry association leaders reported members working in both sectors, as well.

[e.g., #I-2, #I-3, #I-6, #I-7, #I-10, #I-16, #I-17, #I-19, #I-22, #I-23, #I-24, #I-25, #I-31, #I-39, #I-40, #I-42, #I-45, #I-46, #I-48, #I-50, #I-51, #I-52, #I-54, #I-57, #I-59, #I-61, #I-64, #I-65, #I-69, #I-72, #TO-4, #TO-9] Comments included:

- A white male owner of a VO-SBE-certified specialty services firm reported that their firm does approximately 25 percent of its work with private firms and about 75 percent of its work with public entities. He added however, “A lot of times we really don’t know, because I get the phone calls the day before.” [#I-11]
- The white male veteran with disabilities owning a professional services firm reported that he works in both sectors. [#I-7]
- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT-, TGB-certified professional services firm reported that his firm has done both private and public sector work. He indicated the company has conducted work for developers and for cities, counties and other government entities including the participating entities. [#I-43]

Some business owners and representatives interviewed reported working mostly in the public sector. For instance, comments included:

- The white female attorney representing a chamber of commerce reported that some members strictly work as primes and subcontractors in the public sector. [#TO-1]
- A white female representative of an SBE-certified majority-owned construction firm noted that the majority, “95 percent” of the work the firm did was public. [#I-35]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm reported that most of her firm’s projects are in the public sector. [#I-44]
- A white male person with disabilities owning a TGB/CERT-certified specialty contracting firm reported that the business is unionized performing about 90 percent of its work in the public sector. He added, “Like schools and government work ... and prevailing wages ....” [#I-12]
- The white male representative of a Hispanic American owned MBE-, DBE-, SBE-, MCUB-, SUBP- TGB-, CERT-certified professional services firm commented that he works in the public sector and “not too much” in the private sector. [#I-29]



- The white male veteran with disabilities owning a VO-certified specialty contracting firm reported, “We don’t do any private stuff ... all the work we do is with municipalities, cities, school districts, Met Council projects.” [#I-26]

Some business owners and representatives interviewed reported working primarily in the private sector. [e.g., #I-55, #I-62] Often times these firms reported wanting to work in the public sector, but not being able to crack that market. These included:

- The Subcontinent Asian American owner of a professional services firm commented that he has not tried to pursue public sector work because he would never know where to start. [#I-28]
- The white female owner of a DBE- WBE-certified specialty contracting firm indicated the majority of her firm’s work is in the private sector mostly because she has been unsuccessful bidding public sector work as a DBE. [#I-56]
- The African American female owner of a professional services firm indicated that her firm works only in the private sector. However, she indicated that she would “love to do business with public institutions.” [#I-71]
- The immigrant African female owner of a goods and services firm reported working only in the private sector. However, she reported a desire to work in the public sector. [#I-58]

Many business owners reported challenges when pursuing or performing public sector work. Business owners and representatives indicated greater barriers when seeking public sector work.

Several reported the procurement process, paperwork and restrictive criteria as barriers to public sector contracting:

- The Subcontinent Asian American male representative of a minority-owned goods firm indicated he has not worked with the public sector in the past, but in recent years, they have been encouraged to do public projects by one of their independent contractors. He said that it seems like a lengthy process to qualify and that there is a lot of paperwork involved. [#I-66]
- A focus group participant representing a public entity, when asked if “paperwork” caused barriers for firms, commented that RFPs and RFQs from each entity vary causing confusion for small and certified firms. [#FG-1]
- An African American owner of a MBE-certified professional services firm reported that his firm worked in both the public and private sectors, though they have not performed work in the public sector “for a while.” When asked why this is, he indicated that the procurement process is time-consuming, and his firm rarely has enough time to propose. [#I-16]

- The white male owner of a goods and services firm commented, “[I’m] finding that with the bigger [state] contracts, there’s a lot more ‘red tape’ to get through ....” [#I-69]

The same business owner commented that prompt payments were occasionally difficult with public entity projects. He added that he works as a prime with the public sector. [#I-69]

- The African American female owning a MBE-, SBE-, WBE-certified professional services firm reported that her work had been “mostly ... Hennepin County, University of Minnesota ....” She added that with “public ... a lot more paperwork is involved.” [#I-17]

She contrasted, “In a private setting it’s usually just a phone call, you just need a referral .... so not as much initial up-front work for private work.” [#I-17]

- The Hispanic American male owner of a professional services firm had attempted to secure state work. He reported that he learned he could seek a master contract with the State of Minnesota. He commented that he went through the process and submitted a proposal, but was rejected because he did not meet certain criteria. [#I-68]

Some reported that “low bid” posed barriers to working in the public sector, for example:

- The white male owner of a specialty contracting firm indicated his firm does not often pursue work with state and government agencies because “they always are required to take the low bid.” He said they do not do a good job of qualifying their contractors because of this. [#I-51]
- A white male representative of a majority construction firm reported as a barrier, “Governmental requirement to select the lowest price bidder.” [#AI-1]

Prevailing wage and securing payment for services rendered were barriers for some firms, when working in public sector:

- The white female owner of a DBE- WBE-certified specialty contracting firm indicated that prevailing wage requirements are a major disadvantage to pursuing public sector work. [#I-56]
- The white male owner of a goods and services firm commented that prompt payments were, as a prime, difficult with public entity projects. [#I-69]
- The white male owner of a specialty contracting firm reported that he has not had positive experiences with public sector work. He conveyed, that as a subcontractor on a public project, he was ordered by a prime to perform free work to fix problems caused by another subcontractor. [#I-36]

For instance, some reported limited public sector budgets as a barrier to doing work in the public sector:

- The Hispanic American part owner of a Hispanic American woman-owned marketing firm commented that public clients typically have limited budgets and no room for needed additions throughout the project. In contrast, private sector clients understand additional work when needed. [#I-5]
- The white male veteran owner of a DBE-certified specialty services firm reported, for example, “There are a lot of things with [specialty services] that are roadblocks.” He added that compensation does not reflect actual cost to run the truck. [#I-2]

Some reported on the challenges of proposing on or bidding public sector projects. Others reported limited opportunity to propose or bid.

- The Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm indicated having tried to do work as a sub, but not doing it because it is “huge and challenging.” The entities, he said, want the firm to submit bids just to fulfill minority quotas, but then nothing comes out of that because they have designated vendors they want to work with. This, he added that this is a “barrier.” [#I-42]
- The African American female owner of a professional services firm commented, “I would love to do business with public institutions.” The same business owner continued, “But, I don’t ever get that opportunity. I’m never given that opportunity. And I’ve had this conversation ... before, and nothing ever came of it. I’ve had people say, ‘Well, I’m going to make sure that you’re on the list. [I’m] going to make sure that you’re called ....’ But, it never happens .... I just think in my head, ‘It’s never going to happen.’” [#I-71]

She went on to ask, “How do you know when there’s something available? Where do you go when you do know that something is available? How do they market to the minority community? Is there a plan ... a marketing strategy? Do they source us out, or [do] they just give it to their [friends]?” [#I-71]

**Business expansion or contraction over time.** Business owners and representatives expressed whether their businesses have expanded or contracted, and the reasons why or why not.

For many business owners and representatives interviewed, business size stayed relatively constant. [e.g., #I-15, #I-36, #I-44, #I-46, #I-50, #I-52, #I-56, #I-59, #I-61, #I-71] These interviewees included:

- A white male owner of a VO-certified specialty contracting firm reported currently being the only employee. He added that the business size was constant conveying, “I have no intention at this age of going to one hundred employees.” [#I-9]

- The African American president of a minority immigrant organization indicated that perhaps two- or three-member businesses have expanded. He indicated that the rest are usually the one or two people who started the business. [#TO-7]

He added that the market conditions are influential. He reported that some members have received contracts from the State, but expansion depends on getting one or two good contracts so afterward you can hire more people. [#TO-7]

Some business owners and representatives interviewed reported having grown their staff over time, or predicted the need for more employees. [e.g., #I-25, #I-42] Comments included:

- The white male owner of a SDVOSB-certified specialty contracting firm indicated that every year they “slowly grew” and hired one or two employees per year. [#I-6]
- A white male owner of a goods and services firm reported, “We started from the ground up with [about] three employees ... now we’re to 50 employees today.” [#I-69]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider reported, “When we first started out it was me doing all the jobs and I had a guy doing telemarketing for me, and now we have thirty people.” [#I-19]

He also addressed seasonal change in the size of his company: “Historically it’s been seasonal; we usually go down to 75 percent of our peak in ... December, January, February, March. We have just started working in the federal market ... we have federal jobs that are hard-bid jobs... so now we are doing jobs all over the US.... So, we hope that we stay at our current level throughout the entire year.” [#I-19]

- The white male owner of a specialty contracting firm indicated that, in his industry, firms expand in accordance to workload and client base. He commented that his firm has expanded over the years “... from zero to \$3 million.” [#I-51]
- An immigrant African female owner of a goods and services firm indicated that the firm has recently acquired more square footage, and she anticipates hiring more office staff to support the business. [#I-58]

On the other hand, several business owners and representatives interviewed reported having reduced staff over time. [e.g., #I-38, #I-27A] Comments included:

- A white male veteran owner of a professional services firm reported that the firm revenue dropped in and the number of staff dropped by about one-half. [#I-3]
- An African American owner of a MBE-certified specialty contracting firm, having indicated that his firm had become smaller due the economic crisis. [#I-21]
- Regarding the current economy, the white male representative of a white woman-owned DBE-WBE-certified specialty contracting firm reported that the firm has downsized significantly in the last two years due in part to what he perceives as a downturn in construction work in the Twin Cities Metro Area. [#I-46]

- The white female co-owner of a WBE-certified goods company noted that the firm has fewer employees than it did at one time, explaining, “Over the years what we’ve seen is the ability for us, because of technological changes, to have a level of output and we have less employees than we did at one point because of technology.” [#I-27]

A number of business owners and representatives indicated that their firms had gone through or regularly go through repeat cycles of expansion and contraction. Fluctuations in the economy or seasonal businesses contributed to some variability in business size. For example:

- A white male person with disabilities owning a TGB/CERT-certified specialty contracting firm reported that the work is seasonal and requires five employees in the winter and twenty in the summer. [#I-12]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) indicated that her firm expands and contracts as needed. She conveyed that the number of employees active in the field ranges from 15 to 25 depending on the workload. [#I-45]
- An African American owner of a MBE-certified professional services firm reported that his firm started alone, and that he has been able to hire others over time. He stated, “There have been times where I have more than ten people, and times, like now, with two. It depends on the contracts we have ....” [#I-16]
- The white female representative of an SBE-certified majority-owned construction firm indicated that the work was highly seasonal, and the company expands from around 10 employees in the winter to around 60 in the summer. She added that the firm added, “Maybe three [specialty contractors],” to expand into a new industry. [#I-35]
- A white male owner of a specialty contracting firm said, “Right now, I have five [employees]. In the winter, sometimes I have 12.” [#I-57]

Several business owners reported engaging subcontractors, when needed, to increase their capacity to conduct work. For example:

- The African American female owner of a specialty services firm reported maintaining a constant size by engaging subconsultants to help her firm on an as-needed basis. [#I-24]
- The Hispanic American part owner of a Hispanic American woman-owned marketing firm stated that the firm hires subcontractors as needed for “the repetitive portions of projects.” [#I-5]
- The African American male owner of a CERT/TGB-certified specialty contracting firm reported adding subcontractors as necessary. He stated that subcontractors make it easier to operate a seasonal business; he has a “dry spell” between December and May. [#I-40]

**Size of contracts and changes over time.** Business owners reported on whether their firms' contract sizes varied or had grown or decreased in size over time.

Most firms conducted a wide range of project sizes. For instance:

- The white male person with disabilities owning a TGB/CERT-certified specialty contracting firm competing against larger firms and DBEs reported jobs ranging from \$1,000 jobs to a “basic niche [of] \$40,000-\$200,000.” [#I-12]
- A white female representative of an SBE-certified majority-owned construction firm commented on the company's contract sizes: “... a few thousand, but we can bid up to \$14 to \$15 million contracts.” [#I-35]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported that his contracts can be as small as \$2,000 and as large as \$1 million. [#I-67]
- The Native American female owner of a closed construction firm who now owns a professional services firm said, “When I had my construction company, it'd be everything from \$50,000 to \$6 million. That's where I was bidding.” She added, “As a consultant, right now I'm doing contracts between \$10,000 and about \$25,000.” [#I-61]
- A white female owner of a CERT-certified specialty services firm reported capability for up to \$1 million contracts but has an average project size of \$1,000 to \$2,000. [#I-64]
- A white male veteran owner of a professional services firm commented, “We have always prided ourselves on doing very small jobs.” He added, however, “... We are involved now on a couple of different [projects] that are over twelve million dollars each.” [#I-3]
- The white female owner of a DBE-, WBE-, SBE-, TGB-certified professional services firm reported that her firm performs on projects from \$1,500 to \$4 million on multi-phase projects. [#I-48]
- A white male owner of a VO-SBE-certified specialty services firm reported when asked about the range of contract sizes his firm has been involved with, “For us, they could range from \$1,000 to ... over a million, but we don't know what the size is because we bill them by the hour ....” He commented, “We're kind of like an ‘as needed.’” The female representative of the same firm explained, “We don't get set contracts.” [#I-11A]
- One white male executive director of a non-profit trade association reported that the association has small companies that work for \$1 million per year to larger companies that work from \$10 to \$100 million a year. [TO-4A]

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported her firm performs work ranging from \$200 to \$12 million. She added, "That could be for the same customer ...." [#I-45]
- A white male representative of a white women-owned specialty contracting firm when asked about the sizes of contracts his firm performs, reported that his firm is currently working on a \$500,000 project; however, he reported very small projects "down to five hours." He commented, "We have a wide spectrum of things we do here." [#I-31]
- The white male veteran with disabilities owning a professional services firm reported that he works regularly with Minnesota State on contracts of \$25,000 or less and on other projects up to \$1 to \$2 million. [#I-7]
- One white male owner of a goods and services firm reported, "Any [size], from a 50-cent part to ... a \$250,000 sale." [#I-69]
- The white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting firm noted that the sizes of her contracts ranged from \$300,000 to \$800,000. She added that the type and size of contracts is determined by bonding and she needed to collaborate with someone else to get bigger projects. [#I-23]

Some reported consistently working on relatively small contracts. [e.g., #I-13, #I-40, #I-52] These businesses included:

- The white female with disabilities owning a professional services firm said in the past clients have given her "a variety of different assignments" ranging from \$80,000 to \$90,000 over the year. However, she added, "A more typical assignment would be ... about \$10,000." [#I-50]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider remarked, "We bid jobs that are on the construction exchanges, and just like anything it depends on how much work is for us in that particular... construction project." He said, "Residentially, we do jobs \$200 to \$1,000 every day .... Commercially, we have contracts that start at \$5,000 and work their way up to \$75,000, and that's the norm." [#I-19]
- The African American owner of a MBE-certified specialty contracting firm commented, "I like to focus on contracts around \$100,000." [#I-21]

**Current economic conditions and other conditions in the marketplace.** Many interviewees discussed how the current economic conditions in their industry impacted business operations and workload.

Most business owners and representatives reported mostly good or improving economic conditions. [e.g., #TO-1, #I-3, #I-13, #I-16, #I-19, #I-21, #I-22, #I-23, #I-24, #I-31, #I-36, #I-37, #I-39, #I-44, #I-50, #I-51, #I-52, #I-69] For instance:

- A white male person with disabilities owning a TGB/CERT-certified specialty contracting firm reported, “Banks are starting to come back .... lending to people” so the private sector has started to pick up recently. [#I-12]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) when asked about the current economic conditions in the Minnesota marketplace for her firm and others in her industry, stated, “Things are really busy and going well.” [#I-45]
- An Asian-Pacific American male representative of an immigrant business association reported, “I think that the current economy is healthy somewhat .... [Current economic conditions] have had a good impact on the community so far.” [#TO-11]
- An African American female owning a MBE-, SBE- WBE-certified professional services firm described the current conditions in a positive light, saying, “I would say they’re ‘good-ish,’ it would depend on what industry you’re in .... Like right now there’s a lot of housing being built so ... firms that have that expertise are doing pretty well.” [#I-17]
- The Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm reported that current economic conditions are excellent and getting better because the government is modernizing its [specialty] systems. [#I-42]
- A white male owner of a SDVOSB-certified specialty contracting firm reported, “The Minnesota side seems fairly stable right now ... there’s plenty of work out there. It would be the North Dakota side where they are starting to struggle a little bit ....” [#I-6]
- The white representative of a veteran-owned professional services firm reported that there is a positive outlook now, and that his firm is getting a lot more calls for upcoming work than it had over the past few years. [#I-1]
- A white female representative of a professional services firm said, “There’s a lot of work in construction, but the challenge has been in finding new projects to design.” [#I-15]



- The white male executive director of a non-profit trade association reported that things are going well for many subcontractors; however, it is the matter of hiring skilled workers. He added that the improvement in the marketplace allows the companies to look for qualified employees or contractors. [TO-4A]
- A Subcontinent Asian American owner of a professional services firm noted that getting work is not an issue in his industry. [#I-28]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported that his firm maintains its revenue by doing projects throughout the United States. [#I-67]

Other business owners and representatives were not as positive about the economy. These interviewees experienced poor or worsening economic conditions in Minnesota. For example:

- A white male owner of a supply firm reported that the economy has changed over the last couple of years. He stated, "It is harder to get to sales." [#I-8]
- The African American male owner of a specialty services firm reported, "After the recession, it's ... a little bit better, but ... it's not that encouraging for now." [#I-20]
- The white female owner of a CERT-certified specialty services firm reported, "Difficult in this industry ... difficult economic condition all around right now." [#I-64]
- The Subcontinent Asian American male representative of a Subcontinent Asian American male-owned MBE-certified professional services firm reported, "The economic condition ... is a bit of a struggle because we are small." [#I-54]
- An African American male owner of a CERT/TGB-certified specialty contracting firm said, "The economy has hindered us in getting work in other years. I have seen companies hiring more now, but it has not affected me yet." [#I-40]
- The white owner of a WBE-certified supply firm reported, "Our industry is declining at about a 5 to 7 percent rate each year, so it gets tougher and tougher to grow," [#I-25]
- An African American part owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm said, "The [industry] economy is not favorable in Minnesota now. We have a lot of global competition; larger companies play the pricing game; price rather than quality." [#I-38]

A white female representative of an SBE-certified majority-owned construction firm remarked, "A lot of larger contractors ... don't have a lot of work and because of it that trickle[s] down ... they're not busy so they're bidding on contracts that they typically wouldn't bid on, that we typically bid on" [#I-35]

- A white male owner of a specialty contracting firm said that it is possible that “everybody’s lying to everybody about how great the economy [really] is.” [#I-57]

He continued, “I’m using all my ... funds that I’ve saved and put away for my business [and] for me to retire. And now, it’s getting harder and harder and my [funds are] going down because things aren’t going as they should.” [#I-57]

- An owner of a majority professional services firm reported, that demand in Minnesota was still not what they would like it to be, and so he said that he is considering a move to Silicon Valley. [#I-14]

**Prime-subcontractor relationships.** Business owners and representatives reported on relationship-building among primes and subcontractors, and any barriers.

Some business owners and representatives reported barriers, specifically, for businesses owned by minorities and women, when seeking to develop new business relationships in Minnesota. For example:

- When asked how subcontractors get work with primes in Minnesota, a focus group participant from a public entity commented that without programs, there would be no utilization of certified firms. [#FG-1]
- A Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported that minority contractors have a ‘stigma’ attached to them because people think they will not do a good job. [#I-67]
- The Subcontinent Asian American male representative of a Subcontinent Asian American male owned MBE-certified professional services firm said, “When working with prime contractors ... they have a requirement, but they don’t share it with us, we don’t have control over the relationship and the understanding of the requirements. We will send the candidates information and there is an interview and then we wait for information ... they don’t let us know the result.” [#I-54]

He added, “There are already ‘big giants’ who are actively supporting them and we have to compete with them.” [#I-54]

- A focus group participant commented that business owners tended to work with those firms that they have a “prior relationship.” He reported that relationships took time “and do not happen overnight ... months, years ....” [#FG-4]

When asked to elaborate on how primes find subcontractors in Minnesota, the same focus group participant reported, “It is so natural for various groups; white men ... can hire white men, no problem. Women hire women, no problem; bisexual hire each other, no problem; but somehow when it comes to people of African descent, particularly African American, ... it seems to be an issue ....” [#FG-4]

When asked if there is a stigma for African Americans to engage African American subcontractors, this focus group participant responded, “There is a feeling ... ‘If I do that, will it be acceptable ...?’” [#FG-4]

He further commented that in Minnesota when seeking opportunities with public entities, there was a mindset of “... [for some] I am empowered to do this ... or if I do this, will I get rewarded ... or [for African Americans] will I get punished ...?” [#FG-4]

- The white female with disabilities owning a professional services firm, when asked how she generally finds out about public and private sector work, She said, “I don’t know .... I have always gotten my positions through recommendations [from] people [who are] either already on a project and have worked with me before ... or [people who] worked with me in one department and they moved to another department and hire me. So, it’s been word-of-mouth basically, referrals [too] from the people who are in the agencies or ... other contractors they’re working with.” [#I-50]

Several business owners reported on access to bidding opportunities for businesses owned by veterans. Comments included:

- The white male veteran owning a DBE-certified specialty services firm commented that primes are supposed to contact him when there are new federal or state projects. He reported, “By the rules that I have read, it states that they are supposed to engage me ... contact me about what they can do to help me get work, but they never do....” [#I-2]
- The female representative of a VOSBE-certified specialty services firm reported, “That is the one barrier for us ... it is these ‘GCs,’ when there’s those requirements that they need to fill, they’re ‘gonna’ be looking at the women-owned businesses and minority-owned businesses, and it doesn’t really allow a veteran-owned business to break into that market.” [#I-11A]

A white male owner of the same firm added, “With the building contractors, they usually don’t utilize ‘new’ businesses unless they have to ... a lot of them, like the bigger contractors ... have their subs ... their ‘go-to subs’ .... If there’s not a goal that they have to meet, they’re not ‘gonna’ step outside their comfort zone.” [#I-11]

Some other business owners and representatives reported direct solicitations or receipt of notice-of-bidding opportunities through leads-posting websites or self-directed means to learn about upcoming work or secure relationships with primes. For instance:

- A white female owner of a DBE- WBE-certified specialty contracting firm commented, "... Minnesota Department of Labor ... MnDOT. Those are the jobs that ... are emailed to me, to bid." [#I-56]
- The Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm said that once on a master contract, it is broadcasted to all the state vendors. [#I-42]
- An African American female owning a MBE-, SBE- and WBE-certified professional services firm reported that her firm usually works as a subcontractor reported that much of the process is about 'building relationships' in the industry and registering to get notifications from different entities. [#I-17]

She added that her firm worked with second-tier subs, on occasion, "Based on the project; if they have experience working on a particular type of building type, we're always looking for new relationships." [#I-17]

- The Hispanic American male owner of an MBE/DBE/MUCB/CERT/TGB-certified professional services firm reported that for a public agency, the firm used the entity's website to find out about opportunities (bidding portals) and for notifications. For the private entities, he said the firm routinely visited businesses to learn about opportunities and identify projects one to two years in advance. [#I-43]
- An African American male owner of an MBE-certified specialty contracting firm commented that primes solicit work from subcontractors by "a lot of them go through ... [leads-posting] companies that ... advertise these jobs." He explained, for example, "'iSqFt,' that's one [leads-posting] company that posts a lot of jobs for contractors .... They send me invitations." [#I-21]
- A Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported said that the firm responded to public RFPs. He said he searched "every day" on websites to see what was available for engineering or he called colleagues to keep abreast of upcoming work and walkthroughs for projects. He noted that the firm was also on the Hennepin County and MNDOT's contractor list. [#I-67]

Some prime contractors reported on their outreach to small businesses and minority- and women-owned firms, and any challenges they faced. Comments included:

- When asked if he knows of any general contractors who are looking for minority- or women-owned businesses, the white male executive director of a non-profit trade association stated that he was aware of a general contractor that was very proactive in reaching out to minority-owned firms. [#TO-4A]

- The Hispanic American male owner of an MBE-, DBE-, MUCB-, CERT-, TGB-certified professional services firm reported engaging subcontractors on some of the limited prime contracting assignments he secured. He stated that he tended to seek out other certified firms when including subs. [#I-43]
- A white male veteran owner of a professional services firm reported, "I only use local small businesses. We get ten times the service, half the price, the [professional service] is better, and our clients are more satisfied." [#I-3]

He added, "We have multiple 'small people' we go to get bids on every project we do ... whether it's a state project, a design project, or a local developer project." [#I-3]

- The white woman owner of a certified (WBE, DBE, SBE, CERT, TGB, MCUB, SUBP) professional services firm reported, "We are asked in the RFP ... 'how long you've worked with others as subconsultants.' That drives who we seek as subs on project proposals ...." [#I-39]

She added, "When there's a percentage required from the certified group, that will drive who we hire although our firm as a certified entity carries a lot of weight in the proposal." [#I-39]

- A white female representative of an SBE-certified majority-owned construction firm pointed out that "typically [public sector] has goals put on the project, so we struggle with those ... as a contractor, you are ... set to meet not only ... goals ... on each individual project ... you also have workforce goals." She explained that "it can be very difficult ... to find the [certified subcontractors including minority- and women-owned firms] that have the knowledge and experience to perform," and further, "you're hiring the ... firms to meet these goals, and then they don't have the workforce behind them, so it's a Catch-22." [#I-35]
- When asked how primes located the organization's members for work, the white male executive director of a non-profit trade association stated that there were multiple ways a prime located its members. He indicated knowing that relationships developed between primes and subcontractors where there was a "high level of trust and referrals." [#TO-4A]

He added that the association ran networking events once a month for its members to network with prime contractors and potentially learn about bidding opportunities. He stated, however, that networking events were not exclusive to just members; outside businesses were welcomed. [#TO-4A]

### **Keys to business success and factors that advantage one firm over another in their industry.**

Firms reported on many contributing factors to success and what advantaged one firm over another.

Having a strong business climate and government support reportedly contributed to business success. The white female attorney representing a chamber of commerce commented that the keys to success required a strong business climate and a government that welcomes businesses. [#TO-1]

One business owner reported on the strength of a good “business model.” This Subcontinent Asian American male representative of an 8(a), MBE-, WBE- and CERT-certified professional services firm conveyed that several factors contributed to a firm’s success. He said that having a vision of where you want to go with your business, having a plan and considering all aspects of the business and business model, which must be able to be fine-tuned according to economic conditions, was key. He added that a firm must be dynamic and forward-driven keeping reputation in mind. [#I-42]

Networking and relationship-building with customers and others and repeat business were common themes, when business owners and representatives reported on keys to business success. For some firms, good relationships drove their success. [e.g., #I-3, #I-7, #I-8, #I-14, #I-16, #I-17, #I-19, #I-20, #I-22, #I-25, #I-26, #I-28, #I-30, #I-32, #I-36, #I-37, #I-39, #I-46, #I-50, #I-54, #I-61, #I-63, #I-66, #I-67, #I-68, #I-69, #TO-11] Representative comments included:

- A white male executive director of a non-profit trade association stated building a relationship and networking was important for members to grow their business and work on more projects. [#TO-4]
- A male representative of a minority immigrant business association stated that one of the key factors that contributed to a firm’s success was relationships. He added that members tended to save money, work hard, cooperate and use “family and friends” as partners. [#TO-5]
- An African American partial owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm indicated that relationships and employees are keys to success.” [#I-38]
- When asked what key factors contributed to the firm’s success, the white male owner of a VO-SBE-certified specialty services firm replied, “.... repeat business ... the contractors that utilize us every year.” [#I-11]
- An African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm commented, “We have solid relationships with contractors that keep us busy.” [#I-22]

Many reported keys to business success as driven by hard work, reputation, good customer service, quality work and fair pricing. [e.g., #I-28, #I-34, #I-48, #I-62, #I-64] Interviewees comments included:

- A Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm reported that several factors have contributed to his firm’s success including hard work, persistence, flexibility and willingness to provide the services that come their way. [#I-43]

- The white male owner of a goods and services firm commented, “Most of us grew up as farm kids, so we’ve got the work ethic .... Just because it rings five o’clock does not mean you are done with your job. You go home when your project is complete.” [#I-69]
- A white male owner of a specialty contracting firm commented, when asked about factors that contribute to his firm’s success, “Sacrifice. I sacrifice time with my family, [and] work, work [and] work.” [#I-57]
- The white male owner of a specialty contracting firm said that a good “reputation” gave firms in his industry an advantage over others. [#I-51]
- A white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) stated, “My dad’s a smart guy who’s really hard working and driven, and I have those similar qualities. Therefore, we are just fair ... ethical and honest, and we have a good reputation .... I think ... that ‘reputation and that brand’ is what keeps us going.” [#I-45]

The same business owner expressed that bonding, insurance and pricing on materials and equipment are secondary to relationships and reputation as factors to her firm’s success. [#I-45]

- The white representative of a veteran-owned engineering firm reported, “...the quality of services we can offer compared to some of our competitors is a lot better ... also it is a lot cheaper ....” [#I-1]
- An African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm, when asked about key factors that contribute to the firm’s success, replied, “I would say the quality of work we put out.” [#I-22]
- The white male person with disabilities owning an SBE-certified professional services firm, when asked about factors that contribute most to the success of his firm, reported that “quality of work, pride in one’s work and going beyond the owner’s expectations” were most important. [#I-10]
- A white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm stated that the main reason general contractors hire her firm was because of the “customer service.” She indicated, “We always answer the phone [and] we do a lot of ‘handholding.’ Luckily, we have a great group of project managers that are extremely patient .... A lot of the general contractors out there have very young [workers] who don’t know all the ins and outs of everything. They just panic because they see these dates they have to hit .... We do a lot of ... handholding.” [#I-44]

She continued, “We constantly send emails and reminders .... to keep the project moving along on time.” She added, “What we’ve heard ‘over and over again’ ... general contractors that they know they can [award] us the job ... it’ll be taken care of.” [#I-44]

- The African American owner of a MBE-certified specialty contracting firm stated, “Having the right person for the right job,” is important in his industry. [#I-21]
- A white female owner of a TGB-, CERT- and WBE-certified specialty contracting firm stated that her firm’s reputation for “quality and follow-through” is an important factor to their success. She said their follow-up customer service after projects has led to recurring projects with their customers, and added, “We put customer service at the top of our goals for every project ... that’s how we differentiate ourselves ....” [#I-30]
- A white male owner of a VO-certified specialty contracting firm reported that offering good quality work to customers is a key to success. He said, “My quality .... The quality of my work ... I’m pretty fussy.” [#I-9]
- The white female with disabilities owning a professional services firm said, “I’m a quick learner. I am able to absorb information about a project and a company’s industry very quickly ... [I] understand their audience needs very quickly. I ask good questions. And ... it’s apparently a big advantage that I meet my deadlines and come within the budget I present ....” [#I-50]
- The immigrant African female owner of a goods and services firm stated that “pricing” was an important factor, as some suppliers markup their products significantly. [#I-58]

Many indicated that firm longevity and experience were keys to business success, as well as advanced skills, training and education. [e.g., #I-48, #I-61, #TO-3, #TO-4] Examples included:

- An African American owner of a MBE-certified professional services firm reported that having previous experience and being able to provide good references to clients were important. He also conveyed that success “comes down to skills.”  
  
He added, “So, getting references, and being able to [communicate effectively] what you want to do and having that ‘long history’ is I think one of the biggest barriers [for emerging businesses] .... Once you get over those [barriers], I think things become a little bit [more] straightforward.” [#I-16]
- The Subcontinent Asian American male representative of a Subcontinent Asian American male-owned MBE-certified professional services firm reported, “... the passion, the experience, the understanding of the industry, our ‘longstanding experience of nearly 50 years between [us].’” [#I-54]
- The Hispanic American male owner of a professional services firm reported that the length of time in business, the more the firm could succeed since the firm builds reputation. [#I-68]



- One white male sole proprietor of a veteran-owned consulting firm stated that a key factor to his success was his prior experience with the State and other work experience. He added, as a benefit, “Everything you can add to your resume puts you in a position to be more successful in the future, particularly if there’s a downturn in the economy.” [#I-4]
- A white male representative of a white woman-owned CERT -certified specialty contracting firm said that some of the factors that contribute to his firm’s success include his experience in the industry in a “kind of niche market.” [#I-37]
- The white male owner of a goods and services firm said “the local technical schools [and] technical training” in Minnesota have contributed to his firm’s success. [#I-69]
- A Native American male representative of a non-profit minority education and training association commented that the factor that most assisted people within his community to be ... start their own businesses was “education.” He reported, “The principal building block is the K-12 educational piece. And then beyond that, the advanced training, whether that is a career training certificate all the way to a four-year degree.” [#TO-8]

Many business owners and representatives reported that hiring and retaining qualified staff contributed to business success. [e.g., #I-1, #I-3, #I-8, #I-15, #I-17, #I-20, #I-21, #I-26, #I-28, #I-43, #I-51, #I-56, #TO-11] Comments included:

- The white male person with disabilities owning a TGB- and CERT-certified specialty contracting firm remarked that hiring employees to perform the functions that challenged him made “life a lot easier.” [#I-12]
- When asked about other factors that contributed to his firm’s success, an African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider reported, “That ... we have a sales staff.” [#I-19]
- The white male representative of a white women-owned specialty contracting firm stated, “I would say one of [the] key things in my success is my employees. I have a ... unbelievable group of employees. It is like a big family. I have very little turnover, and the employees that have turned over here ... we’re still in contact, and some of them actually are still friends of mine in different locations of the state ....” [#I-31]
- The white female owner of a DBE- WBE-certified specialty contracting firm remarked, “... the majority ... 99 percent are male... When I hire a guy ... I treat them with respect, and they treat me with respect .... So, they like working for me.” [#I-56]
- A white male owner of a goods and services firm reported that good employees are key to a firm’s success. He said, “We’re growing. Right now, the biggest thing is finding employees.” [#I-69]

Understanding the importance of teamwork was another key to success for some business owners. For example, comments included:

- The white female with disabilities owning a professional services firm stated that she met clients via word-of-mouth and that her ability to “translate internal language into language that is understandable to [audiences] outside [her] industry” also contributed to her firm’s success. [#I-50]

She added, “I’ve been told that people very much appreciated that I always met my deadlines, which apparently doesn’t always happen .... And I think [my success was] because I really tried to learn as much as I could about the [client], and became as much a part of their team as possible.” [#I-50]

- The white male representative of a white woman-owned WBE-, DBE-, MUCP-, CERT-, TGB-certified professional services firm reported, “By having [a clear] understanding [of the client’s needs], ... helps us make sure that we’re providing the appropriate types of services to our clients.” He added, “I think ... the biggest thing that we provide [differently] is when we work with our clients we don’t treat it as a project, we treat it as a ‘partnership.’ So, there’s a lot of time and energy that we invest to understanding their business, their goals and [their] objectives.” [#I-52]

For one unionized business owner, unions were a positive; for others, unions made achieving success more difficult. Some business owners reported on their union status and how that status impacted their success. [e.g., #I-17, #I-19]

One interviewee said that being a union employer had helped his firm:

- A white male person with disabilities owning a TGB- and CERT-certified specialty contracting firm that was unionized commented that he has hired some very good workers, who without the union, would not have considered working for him. [#I-12]

A number of small business owners reported negative impacts:

- An African American male owner of a CERT/TGB-certified specialty contracting firm reported, “The union has ... blacklisted me amongst the contractors. We are preparing a suit against them; [First] to avoid the high costs of being a union member and second to have the prime contractors being contacted by the union to alert them to the fact that our firm is not union and [the union is] blacklisting us.” [#I-40]
- The white male owner of a specialty contracting firm reported, “I think the requirement of some work to be union work is disadvantageous. I think a company and its employees should be able to decide whether they want to do that or not. I don’t think we should be limited by union contracts.” [#I-51]

- A white female owner of a WBE- DBE-certified specialty contracting firm reported, “[It] is difficult [to do] when you-re a union shop.” She added, “The union [was] passing these minority people around from contractor to contractor” to meet quotas, as there was only so much minority labor out there. She claimed, “It’s not as legitimate as they’d like it to be and the reason it’s not is because they legitimately don’t have that many people with that kind of a skill level that can actually do the work.” [#I-34]
- An African American owner of a MBE-certified specialty contracting firm said, “When it comes to the labor agreements ... I don’t have a problem, my employees don’t have a problem ... but when it comes to the unions, there my employees have a problem.” [#I-21]
- The Subcontinent Asian American male representative of a minority-owned goods firm noted that being a union member would be a “huge disadvantage,” especially for them as a small business. [#I-66]
- An African American owner of a TGB-, CERT-certified specialty contracting firm reported that it was hard for his firm to bid against union companies, larger companies that can bid low because they have many simultaneous projects. He stated, “[Larger union firms] might just make \$10,000 on each project, whereas if you only have one project of that size per year, you can’t just make \$10,000 on it ... you won’t be in business.” [#I-13]

The importance of keeping and maintaining equipment was a positive for some businesses; for others, high equipment costs were a barrier to success. Access to needed equipment and favorable pricing, either through ownership or rental, contributed to many businesses’ opportunities for success. [e.g., #I-17, #I-19, #I-20, #I-21, #I-22, #I-23, #I-51] For example:

- A white male person with disabilities owning a TGB/CERT-certified specialty contracting firm commented that he spent a lot of money on equipment. He asked, “Would you rather have a DBE that’s broke [and cannot afford equipment] ... or somebody who can pay their bills [and have the equipment needed to complete the job]?” [#I-12]
- The white male veteran owner of a DBE-certified specialty services firm reported that he owned one dump truck that needed replacement. The replacement truck would cost over \$220,000, which he reported that he could not afford. [#I-2]
- A white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm indicated that the size of contracts her firm pursues depends on the types of equipment and number of full-time employees they had. She indicated that she wanted to invest in [new equipment] in hopes that it would allow them to complete larger projects. She added that her firm would probably add more equipment before it adds more employees. [#I-44]

The white female owner of a specialty contracting firm reported, “If I had the funding ... I would buy two dump trucks ... funding is a big thing.” [#I-59]

- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm indicated that the high cost of equipment can be a barrier. She said, “Probably not having the [specialty equipment] is the only thing that’s hurting us [by preventing our ability to] get some work.” She continued, “And that’s why we have to make a decision on moving to the next level of equipment. The next level of equipment isn’t a cheap level.” [#I-44]

Several business owners reported whether new technologies drove business success, or could be put on hold. These included:

- A white female representative of a white male owned professional services firm reported that the firm invested in and developed a [proprietary] software product that added to business success. [#I-15]
- A white male representative of a white women-owned specialty contracting firm stated, “In today’s day and age, the ability to ‘bend’ and refocus [is an advantage].” He continued, “In the [specialty contracting] business, technology ... changes so fast .... Technology has changed so much in the last three, five, ten years .... You have to be willing to update and bend with that, or you become obsolete.” [#I-31]
- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT-, TGB-certified professional services firm said making sure they are “on top of where the technology is going” is a key to their success. He added that understanding how markets use technology to find information and products to buy and select companies to do business with is also a factor to his firm’s success. [#I-52]
- On the other hand, the white representative of a veteran-owned engineering firm reported that refraining from buying all the latest technology at once and trying to use cash rather than financing was important to business success. [#I-1]

Some reported on the importance of access to favorable pricing and credit regarding materials or products. Although a few indicated having access to competitive pricing, others did not. [e.g., #I-17, #I-68, #I-21] Interviewee comments included:

- Regarding pricing of materials, the white male owner of a supply firm commented, “We probably get ‘the best pricing ever’ from all of our manufacturers. In fact, other vendors would like to get as much as we do.” [#I-8]
- A white male representative of a white woman-owned WBE/DBE-certified specialty contracting firm commented that low pricing was the most important factor in the industry. He continued that securing good pricing was critical for the firm to stay competitive. He stated, “The relationship with suppliers is huge in his industry ... there are a lot of companies that can do the same thing that we do.” [#I-46]
- An African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm reported as a barrier to business success, getting accounts with distributors and securing fair pricing. [#I-22]

- The African American male owner of a CERT/TGB-certified specialty contracting firm commented that one specified supplier was helpful to him regarding materials pricing. [#I-40]
- An African American male owner of a specialty services firm, when asked if having access to favorable pricing and credit for materials and products was a contributing factor to his firm's success, he stated, "It's always good to look for the best [price] so you're able to [perform] the job with satisfaction for your client." He added that some projects required more costly materials, and indicated that his firm was accustomed to paying more than usual, saying, "Sometimes we need to do a job that we have ... to be in a good standing [for], so that people will appreciate what [we] do and they will be able to recommend [us] for other jobs." [#I-20]
- A white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting reported that she lost a lot of work due to limited access to best prices. She noted that first being a small firm put her at a disadvantage with pricing, as suppliers favored larger firms. [#1-23]

Additionally, this same business owner continued that when bidding against a "particular company," that firm repeatedly secured better pricing. She conveyed that being a woman-owned business could have been the reason. [#1-23]

Because of unfair pricing, she stated that her business now worked out of town more to secure opportunities for work. [#1-23]

Many business owners reported that financing, access to capital and a healthy cash flow determined a company's ability to secure opportunities. Businesses reported "high capital" as an advantage and limited capital as a disadvantage, when seeking work. [e.g., #I-3, #I-14, #I-17, #I-20, #I-21, #I-23, #I-44] Comments included:

- The white female Executive Director of a women's service organization reported as a key to business success: "First and foremost, wealth. If they have personal wealth that they bring to the business, their businesses naturally do better. Secondly is ... either a strong financial acumen or the willingness to use resources in that space. They have to recognize that that's a key driver for their business." [#TO-3]
- An Asian-Pacific American male representative of an immigrant business association reported that members with high capital have an advantage because they are able to bid on larger projects. [#TO-11]
- The African American male owner of a specialty services firm stated, that not having access to financing and funding was a disadvantage for his firm. He went on to indicate that his firm missed several contract opportunities because it was unable to secure funding. [#I-20]

- A white representative of a veteran-owned engineering firm stated that maintaining “cash flow and flow time” is important in order to avoid making big payments when they are not making much money. [#I-1]
- An African American male owner of a (MBE, SBE, TGB, DBE, SBE, CERT) specialty contracting firm said, “Cash is key ... it’s all about the cash flow.” [#I-63]
- A Hispanic American representative of a minority-owned construction supplier stated that “capital is the big issue” for success. [#AI-129]
- The African American female owner of a specialty services firm stated, “The way I run this business [is] ... conservative because I never want to be strapped, so I haven’t risked a lot ... I think that’s also possibly why I haven’t been as successful as I probably could have been.” She explained that it is an advantage for firms in her industry when their owners have the resources and capacity to invest financially in order to grow their business. [#I-24]

Access to bonding (when necessary), impacted whether a business successfully secured some contracts. Bonding requirements, for some, drove what jobs they could and could not bid, for example:

- A focus group participant from a public entity reported that “traditionally” bonding was and is a barrier for small firms. He commented, “They [bonds] are very costly ... expensive ... 3 to 4 percent of your contract.” He added that a person owning a business is often guaranteeing the bond with their house as collateral. [#FG-1]
- An African American president of a workforce trade organization commented that bonding was a barrier for small businesses in the construction industry. He commented, “The dominant white culture set these things [bonding requirements] up out of prejudice ....” [#TO-6]
- A Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm commented that the challenge he faced with bonding was having the cash reserves required to qualify for bonding coverage. [#I-18A]
- The white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting firm reported that bonding capacity determined which jobs the firm could self-conduct and when the firm needed to collaborate with a larger firm to secure a contract. [#I-23]
- A public forum participant mentioned that bonding was a barrier to doing business. She further commented that bonding was a “huge expense” for disadvantaged businesses. [PFP#18]

- An African American male owner of a specialty services firm stated that his firm did not bond often. He commented, “When you are doing bonding, you have to have money too. So, borrowing from anybody is cheaper than bonding.” [#I-20]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm reported that ability to secure bonds indirectly affected the success of her business. [#I-44]
- One African American female owner of a specialty services firm indicated that she specifically pursued contracts that ‘did not’ require bonding.” [#I-24]
- A white male director of a non-profit trade association stated that members “have to understand the bonding issue [as it] can be complicated ....” [#TO-4A]

Having the ability to secure the proper insurance was reported as important to business success. The high price of insurance or expansive insurance bidding requirements affected some businesses’ profitability. [e.g., #I-17, #I-20, #I-28, #I-68] For instance:

- The white female owner of a DBE-WBE- SBE-, TGB- certified professional services firm reported that having adequate insurance coverage is key to offset risk. [#I-48]
- One white male veteran with disabilities owning a professional services firm reported, “Bonding and insurance requirements are mandatory for us to contract with the State of Minnesota; I have to carry a \$2 to \$3 million policy that I won’t ever have to use. You have to pay the premiums that exceed the limits of a normal policy. I’m treated like a contractor who is in construction. It takes away from our profitability due to the high level of insurance.” [#I-7]
- A focus group participant from a public entity indicated that in the marketplace the liability insurance is \$2 million and that TGB firms experience challenges obtaining that level of insurance. [#FG-1]

This same focus group participant added that the County’s Risk Management team approved a reduction of insurance to \$500,000. He said, “That has helped a lot ... the cost was quite high [before the reduction.]” [#FG-1]

- A focus group participant from a public entity commented that she has knowledge of firms experiencing challenges with insurance. [#FG-1]

Several business owners reported that size of the firm impacted its ability to achieve success. These comments included:

- A white male owner of a SDVOSB-certified specialty contracting firm stated, “[Size], it is an advantage but it is a disadvantage ... we are small enough that we can be personable with our clients, but then the disadvantage to being small is we are limited to the size of contracts we can get ... and our location, where we are at too ....” [#I-6]

- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm commented that size of a firm can give one firm an advantage over another and determine the work that they can be considered to perform. [#I-67]

- The white female owner of a DBE- WBE-certified specialty contracting firm reported “size” as a barrier to success. She commented, “If you’re a ‘big boy,’ you can afford to absorb those costs with that prevailing wage.” [#I-56]

She went on to report, “There [are] a couple of companies over in Rochester that are big, big players and they can afford it .... They bid these contracts [and] they’re making money, but the ... small [specialty contractors] like me aren’t.” [#I-56]

- The white male owner of a specialty contracting firm commented that while working to manage projects, he took only jobs that accommodated his firm’s small size. [#I-36]

### **C. Whether there is a Level Playing Field for Minority- and Women-owned Businesses Overall**

Business owners and representatives discussed issues regarding leveling the playing field. Detailed information for item follows.

- Issues with prompt payment;
- Restrictive bidding and contract specifications;
- Denial of opportunity to bid;
- Unfair rejection of bid;
- Submitting bids or proposals and not getting feedback;
- Bid shopping and bid manipulation;
- Stereotyping and double standards for minority- or women-owned firms when performing work, and any unfair treatment regarding approval of work for minority- and women-owned businesses;
- Any “fronts” or false reporting of good faith efforts;
- “Good ol’ boy” networks and other closed networks; and
- Other related insights.



**Issues with prompt payment.** [e.g., #I-41, #AI-1093] Many business owners reported on their challenges securing timely payments, and the barriers they faced as a result of late payments.

Many business owners reported frequent issues with untimely payments, or having not received a payment they expected. For instance:

- Regarding timely payments, the African American president of a minority immigrant organization said, that “has always been an issue.” [#TO-7]
- The Hispanic American part owner of a Hispanic American woman-owned marketing firm mentioned that payments were prompt only when dealing with their smallest clients, firms of similar small size to their firm. [#I-5]
- A white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm indicated, “Some of the biggest challenges in this industry ... when we get a job, we have to buy all the material and fabricate all the material, and [do] all the detailing and we pay for that as we do it .... We cannot show the general contractors until we deliver it. So, once it’s on the site, then we can start invoicing it.” [#I-44]

She added that many companies withhold a 5 percent retainage on some jobs. She reported, “The job may be that we delivered everything and our part of its done, because we’re kind of earlier in the process in some areas. Then, [the] job might not finish for a year, and that retainage is still sitting there.” [#I-44]

She continued, “Our biggest challenge, now that we have a line of credit, is floating ... we’re kind of the bank. We sit there until we are paid at the end. [#I-44]

- The white male executive director of a non-profit trade association reported that payment issues were the biggest challenge for members and were documented by surveys across Minnesota. He added that depending on the phase the project was in and the type of payment being used, contractors sometimes have to wait anywhere from 60 days to two years to receive payment. He commented that many subcontractors have to finance their projects for the first 60 to 90 days as they will not be paid by the general contractor on time. [#TO-4A]

The same representative stated that not receiving timely payment put subcontractors at risk for not being able to capitalize their work and pay for materials and workers. He reiterated that subcontractors have to wait “60 days minimum,” but “the bigger the project, the more of an issue that becomes.” [#TO-4A]

- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm reported that her firm has issues receiving prompt payment from government entities. She said, “[Government entities] are slower to pay .... [For example], we’re doing a job for a [government] entity and we billed out back in April and we just got a payment now.” She continued, “[Payment] had to go through from the [government entity] to the general contractor, to the [one specialty] contractor, to the [another specialty] contractor to us. So, that’s five layers of payment cycles that have to be processed before we get a check.” [#I-30]

She added that untimely payment affected their cash flow, and conveyed, “We have to be careful with the kinds of contracts we enter into .... That wasn’t made known to us when we signed up for that job. We weren’t told that their payment terms were 60 days. So, that was unfortunately a mistake on our part not to ask those questions.” She went on to indicate there should be more transparency when it comes to payment details. [#I-30]

When asked if issues with prompt payment have ever required her firm to seek additional lines of credit, she stated, “Yes. In fact, [for] this one right now for [named entity], I had to dip into my line of credit ... until that payment came through.” [#I-30]

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm indicated that timely payment was a delicate topic and an issue for small firms. He said, “It’s a huge barrier, if you ask the general contractor or second-tier sub for your payment within 30 days, they probably won’t do work with you anymore.” He added, “Even though it’s required for you to get your payment, you don’t want to make too much noise because you still want that relationship. I have jobs that I haven’t been paid on for six months.” [#I-19]
- A white female owner of a DBE-certified professional services firm reported challenges with untimely payments. She remarked, for example, that she only recently received payment for work she performed in January. [PFP#25]
- An African American president of a non-profit minority trade association reported that there been issues with prompt payments, but in some cases no payment at all. He added that there have been challenges regarding prompt payment for firms performing work as subcontractors, but not as much for businesses doing work with the State. [#TO-9]
- The owner of a majority professional services firm indicated that he has was paid for jobs, but that timing was occasionally an issue. “Yes, I had issues with payments that go from getting paid net-30 that you have in the contract, it becomes net-90, or net-100.” [#I-14]

- The white male veteran with disabilities owning a VO-certified specialty contracting firm commented, "I have an issue with a project right now ... that project is with the general contractor and the Metropolitan Council." He explained, "We had done [specialty contracting] work and not been paid for it .... Normally when you do a job, you are paid and they hold 5 percent. Well they are holding 'all' my money right now." [#I-26]

This same business owner reported hardship stating, "[If] you don't get paid in a timely manner ... small businesses just can't float that kind of capital, they don't have the capital to support long payment times or delayed payment times ...." [#I-22]

- The African American male owner of a CERT/TGB-certified specialty contracting firm reported, "Prompt payment is a regular issue for us; there should be some sort of program to allow us to pay the bills, the contractors delay payment beyond 30 to 60 days and then not pay or at the very end. It is very difficult for us." [#I-40]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) commented, "We're a very robust company, so I can wait three months to be paid ... and that's sometimes how long it takes." She added, "We end up helping many of our smaller MWBE firms with payroll, so we'll end up releasing payment well before we're paid, in order to ensure that they're able to meet payroll and buy materials .... We very often support people with payroll and paperwork help." [#I-45]
- A representative of a construction-related trade association reported, however, "If a prime releases payment and retainage to subcontractors, when not yet paid by the entity on a public sector project, then the 'prime acts as a banker.'" [#FG-3]

A few business owners reported late payments from private sector contracts. For instance:

- An African American female owner of a specialty services firm, when asked if she has ever witnessed or experienced any issues with prompt payment, said, "Oh yeah, it's always an issue." She went on to report that her firm is currently working for a private sector business, and that the firm has yet to be paid for work that was completed in 2016." [#I-24]
- The African American owner of a TGB- CERT-certified specialty contracting firm reported issues with prompt payment from private sector clients. When asked to elaborate on what the issue was, he said, "[Sometimes] they just forget, or don't pay you on time, and then you have to send them emails or a late invoice ...." [#I-13]

Some business owners specifically reported difficulty securing prompt payment on public sector work, either from the public sector entity or from the prime contractor on a public sector job.

For example, comments included:

- The white female Executive Director of a non-profit women's organization reported that a delay in payment of 30 to 60 days could derail low-income businesses; this happens with both direct and indirect contracts. She added that this happens most often with contracts with the counties. [#TO-3]
- The white male sole proprietor of a veteran-owned consulting firm commented, "It took them [State of Minnesota] three months to give me my first check. I think they're quite slow ... I think back on barriers that could be a real problem for a start-up." [#I-4]
- A white male owner of a SDVOSB-certified specialty contracting firm, when asked about problem with prompt payment, reported that the firm experienced a problem receiving payment from one contractor on two Minnesota Department of Transportation projects. He commented, "[The] same contractor, two different projects for a total of about ... \$20,000 ... and it took over 365 days to get paid." [#I-6]

He added that his firm verified with MnDOT that the prime contractor was paid. When asked what MnDOT's response was to his inquiry about the contractor not paying, this business owner indicated that MnDOT's response was that entity could not help him; the firm would need to pursue the contractor's payment bond for enforcement. [#I-6]

- The white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting firm indicated that she has faced issues with prompt payment. For example, she noted that they worked on a highway project through the city three years ago without payment. She said that in the case of other projects done last year; they still have not received retainage funds. [#I-23]

One female African American business owner reported an experience where non-female- and non-minority-owned businesses received payments earlier than her firm. This African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm stated that there have been times when there was "favoritism regarding payment." For example, she reported that she worked on a project where another subcontractor that was not minority- or women-owned business received payment before her firm did. [#I-22]

One business owner reported that payment terms vary from contract to contract, and had no challenges getting paid. The Subcontinent Asian American male representative of a Subcontinent Asian American male-owned MBE-certified professional services firm reported no payment barriers. He reported, "Each client has their own payment system, such as net-30 days or net-45 days ... it is agreed upon and they make the payments according to schedule." [#I-54]

**Restrictive bidding and contract specifications.** Many business owners commented on bidding and contract specifications that restricted firms from bidding.

Several interviewees indicated that prequalification requirements unfairly disadvantaged their firms, when bidding. For example:

- One public forum participant reported on challenging procurement processes. An African American female owner of a DBE-certified professional services firm remarked that prequalification requirements and retainage protocols were barriers for certified firms. [PFP#26]
- An African American representative of a minority-owned professional services firm reported regarding prequalification, “We’ve been in business since [the 80s], and ever since, the biggest hurdle is trying to qualify for prequalification on state contracts.” [#AI-74]
- The African American female owning a MBE-, SBE- WBE-certified professional services firm reported, specifications as a barrier on public sector projects: “There are specific program requirements [for] women-owned businesses and minority-owned businesses or other kinds of designated businesses ... you have to ... really have the resume to show that you have worked with the entity before.” [#I-17]
- Regarding prequalification requirements, an African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm reported, “I would see projects where it says you have to have two projects in the last 18 months that were \$50,000 and over. For a small business and a minority business that’s not ‘gonna’ happen.” [#I-19]
- An African American female owner of a specialty services firm indicated that her firm might not meet prequalification requirements for contracts with the State of Minnesota. She reported, “I saw a couple of interesting ... opportunities [with the State], and I thought I couldn’t go for them because they required a lot more than I think I can do ... [However], I think I actually need to do some investigation instead of just assuming that I can’t.” [#I-24]
- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT-, TGB-certified professional services firm indicated that there is a MNDOT prequalification program. He reported that “they have not qualified and that the underlying message is that they need to go work for someone else, get the experience and try to qualify again.” [#I-43]

Some firms reported that complex specifications, bidding documents and contract specifications made bidding particularly challenging for small businesses and minority- and women-owned firms. For instance, comments reported included:

- A white female co-owner of a WBE-certified goods firm, regarding the complex contract requirements involved in public contracts, indicated, “When you’re a small business like ours, what happens is ... all those contract requirements flow down and you don’t have any support or help to know, ‘What does that actually mean?’” She continued, “A small entity does not have the resources to manage those. And if they were more in plain English or somebody said, ‘Here’s the ones that are going to apply to what I’m purchasing from you today,’ that would be helpful.” [#I-27]
- When asked about restrictive bidding protocols, a focus group participant from a public agency commented that many larger firms, serving as primes, have the capability to bid “as required,” but some smaller firms, trying to move from sub to prime roles, respond to the requirements with “we cannot do it ....” [#FG-1]
- When asked how his firm decides which opportunities to pursue with the participating entities, the white male owner of a specialty contracting firm said, “We look at what the work is, and then the size of the work ... how they’re specified and what the qualifications for the contractors are. And if they are reasonable, quality specifications that can be administered, then we will bid the project.” [#I-51]

He continued, “But all too often, especially in our industry, they’re poorly specified they don’t have any qualifications for the contractors. The State tends to put qualifications on hiring minority businesses and women-owned businesses, etcetera, more than they put any credence on the quality and capability of the contractor.” He added, “By nature, when you accept work from unqualified contractors, you’re eliminating the quality contractors in your work.” [#I-51]

- The white male veteran owner of a DBE-certified specialty services firm reported that through a broker, his business has worked with most of the participating entities. He conveyed, however, it was a “huge headache” to get work with them on ‘his own’ without the assistance of broker. [#I-2]
- The white female representative of a white male-owned professional services firm commented that bidding requirements were often too time consuming causing the firm missed proposal deadlines, on occasion. [#I-15]
- A representative of a majority professional services firm reported, “The proposal systems are cumbersome, inelegant and inefficient. Challenging to navigate.” [#AI-1083]
- A representative of a white woman-owned firm stated, “Contract expectations are a huge barrier for doing work with any state agency. The burden of doing a contract, contract amendments and work plans for work that is usually under \$2,500 is too great to make the work profitable.” [#AI-2107]

Some business owners reported that low-bid projects put small businesses at a disadvantage; some of those businesses simply did not bid. For example:

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) stated, “The [public sector contracts] that we would want to bid on are the [ones] where it’s based on your qualifications as ... we’re looking at bidding a public project, we’re not going to bid something that’s a ‘cattle call’ ... because it’s just not worth the resources and “If there’s WBE consideration too, that’s great.” [#I-45]
- The white male owner of a specialty contracting firm reported, “We see a lot ... ‘low bid’ and ... by the nature of the type of work I do and the attention to detail, [we] tend not to be the low bid. So, in many cases, depending on who’s been invited to bid, I will pass on bidding projects when I know there [are] unqualified contractors that have been invited.” [#I-51]

For a majority construction business using union labor, competitive pricing was a factor when bidding against nonunion shops. He reported, “Pricing when we use union labor versus other competitors that do not.” [#AI-2137]

However, another business owner reported that union requirements significantly “cut” minority-, women- and veteran-owned business participation on public sector contracts. Regarding unions, the African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm reported, “The biggest barrier ... is the union barrier .... When it comes to ‘minority, women, and disabled’ ... you cut the pool down to about less than 5 percent when you say that you have to be [a] union [business] on a project.” He added, “All the big construction companies in the ... Metro Area are union. They will not work with a non-union company, so they are the only ones that ever get big projects .... It cuts the minority ... participation on the projects to zero.” [#I-19]

Some business owners reported on prevailing wages and whether compliance with prevailing wage requirements created barriers for small business owners. Comments included:

- The white female owner of a WBE/DBE-certified specialty contracting firm indicated prevailing wage requirements were a barrier preventing small businesses from working as primes. She expressed that a “major barrier” to pursuing public sector work was the prevailing wage requirements. [#I-56]
- On the other hand, an African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm spoke in favor of prevailing wage. He commented, “I’d rather have prevailing wage than I would [the union]. Prevailing wage and the union labor is the same thing, so why wouldn’t you have prevailing wage on every job?” [#I-19]

One business owner, who employed a designated compliance staff member, reported on issues of compliance and how several entities compared. When asked about any barriers, a white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported that there are differing levels of compliance reporting requirements among entities. She said, “For example, if the City of Saint Paul has over \$250,000 in a project, you have to be union or have a project labor agreement on [the] project. You have to meet all the goals. Whereas in Minneapolis, you don’t have to have a [project labor agreement], you just have to meet the goals.” [#I-45]

She continued, “[For] State of Minnesota, that’s less cumbersome. The reporting requirements aren’t as intensive as [those for] City of St. Paul and Minneapolis.” She went on to say her firm has a staff member who specializes in “all the reporting.” [#I-45]

One business representative reported no issues with restrictive bidding and contract specifications. This Subcontinent Asian American male representative of a Subcontinent Asian American male-owned MBE-certified professional services firm conveyed, “[There are] no bidding issues as there is an RFQ that outlines the specifics.” [#I-54]

**Denial of opportunity to bid.** Some business owners discussed access and opportunity to bid.

Several business owners reported being denied opportunity to bid. [e.g., #I-8, #I-10] Examples of comments included:

- A public forum participant (a white male representative of a minority female-owned engineering firm) commented that location could cause barriers for minority-owned firms. He reported, for example, that some Minnesota entities denied his firm opportunity to bid on projects based on its business location. [PFP#23]
- The African American owner of a TGB-, CERT-certified specialty contracting firm, when asked if he experienced denial of opportunity to bid, reported that he was denied a bid opportunity because his firm did not meet the contract’s minimum requirements. He stated that some contracts required that your firm completed three or five projects of similar size within the past five years. He added, “I think a lot of these [requirements] are set by project managers.” [#I-13]
- The white female owner of a DBE-, WBE-, SBE-, TGB-certified professional services firm reported that her firm was denied an opportunity to bid. She reported, “We’ve had a client tell us that they looked at the jobs we were working [on] and didn’t think we could handle another .... ‘I think that’s pretty unfair ... we know what we can handle ....’” [#I-48]
- The white female owner of a certified (DBE, WBE, TGB, MCUB, SUBP) specialty contracting firm reported that she experienced denial of the opportunity to bid, as some public sector bids were open to larger firms only. She reported, “There’s a lot of that going on in this area.” [#I-23]



Some business owners and representatives reported that when public entities limited access to bidding opportunities it hurt small businesses and minority- and women-owned businesses.

Comments included, for example:

- The owner of a majority professional services firm noted denial of opportunity to bid for many small and minority-owned firms, stating, “Not having access is an indirect way to deny opportunity to bid.” [#I-14]
- The African American female owning a MBE-, SBE- WBE-certified professional services firm reported, as a barrier, “Finding out where opportunities are.” She went on to specify, “Particularly if you get the public work packages that are let out ... to bigger firms, smaller firms don’t have the access to bid on them.” [#I-17]
- When asked about any denial of opportunity to bid, an African American owner of a TGB-, CERT-certified specialty contracting firm reported that his firm has not been allowed to bid as a prime contractor, because many public sector entities package RFBs to incorporate multiple trades. He conveyed, “We’re kind of limited in our access [to bidding]. We can’t just put a straight bid forward if the project involves a lot of different things that we don’t do.” [#I-13]

This business owner offered, as an example, a project at the airport that involved his firm’s specialty contracting services. He stated, “On top of [our specialty contracting services], there was a whole bunch of other stuff, so then we had to provide bids to [the] prime contractors and general contractors ... it’s kind of up to them if they want to go with our bid or mark it up real high [so] we don’t get the work ....” [#I-13]

- A white female owner of a TGB-, CERT- and WBE-certified specialty contracting firm stated that her firm missed some opportunities because they were “not even put out to bid, and [her firm was] excluded from the normal bid process.” She continued, “For instance, I just looked at one [RFB] for Hennepin County ... [her specialty area] was not included in that [request for] bid.” [#I-30]

She went on to report, “That’s the problem ... those opportunities aren’t really advertised. It’s something that [her firm was] doing research [on] and looking for directly, but they’re not necessarily putting it out [to bid] ....” [#I-30]

- American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm noted that were times when the firm was seen as a “small firm” not “able” to bid on or join teams with larger projects. He mentioned, for example, projects such as those at the airport. [#I-67]
- The African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider company referred to open contracts that fill minority goals as limiting access to bidding. She offered, for example, “Department of Administration is a perfect example .... They’ll ... keep adding years on from existing contracts.” [#I-19]

- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm reported, regarding making bidding accessible, “[Sometimes], the timeline is so short .... one ... it was like a week and a half, but it was like a \$500,000 project ....” She reported, “For that [project], that bid process was so quick that you really couldn’t put together an educated bid ... and feel confident .... I skipped it altogether because the risk was too high ... to ... get the correct pricing and make sure it would meet the scope.” [#I-30]
- The Asian-Pacific American male representative of an immigrant business association indicated that not having access to information and not being properly trained can be barriers for the organization’s members when it comes to taking advantage of contract opportunities with the cities and the state. [#TO-11]
- A Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm said there are about twenty websites that he visits on a regular basis to seek opportunities. He remarked that it would be nice if these were more centralized. He said that it is a “time commitment to be able to get through them all.” He also mentioned that there is overlap among the websites as far as projects requiring searching multiple sites to get the information. [#I-18A]

**Unfair rejection of bid.** Some business owners reported having one or more bids unfairly rejected, for example:

- Regarding unfair rejections of bids, the white male person with disabilities owning an SBE-certified professional services firm commented that many minority-owned businesses reached a point where they said, “Why should I try if I’m not going to get it ... why should I make that effort?” He continued, “It’s just a fatalism type thing ... you keep on not getting it, not getting it, and eventually you say, ‘I might as well not try anymore.’” [#I-10]
- An owner of a majority professional services firm reported that unfair rejection of his bid occurred once to his firm. [#I-14]
- The white female owner of a certified (DBE, WBE, TGB, MCUB, SUBP) specialty contracting firm indicated that she has experienced unfair rejection of her bids because of the union. She expressed, “They’re not taking me because the union’s on their ass.” [#I-23]
- An African American owner of a MBE-certified specialty contracting firm said, “I might be the only person that put a bid in for that job, then when the job came up they give it to somebody else.” [#I-21]

**Submitting bids or proposals and not getting feedback.** Business owners and representatives reported on their experiences with submitting bids and proposals.

Many business owners reported submitting bids or proposals and never hearing back. [e.g., #I-23, #I-24, #I-30, #I-32, #I-68] For instance:

- A male representative of a white woman-owned, TGB-certified professional services firm reported that the firm invests a lot of time writing proposals. He added, "... at least 50 percent of the time," the firm does not hear the results of the submission or details of the award. He commented that women- and minority-owned firms want to know why they did not win the project especially when knowing it was in their "wheel house." He added that women- and minority-owned firms need to know their strengths and weaknesses; not knowing the outcome of an award causes challenges for them. [PFP#7]
- A female owner of a WBE- and DBE-certified specialty-contracting firm reported that notification of awards and information on status of submitted bids should be made available. [PFP#1]
- The African American president of a minority immigrant organization said that members submitted bids with no feedback, and that feedback was "crucial." [#TO-7]
- The male representative of a white woman-owned WBE/DBE-certified specialty contracting firm said firm's bids are often "rejected without feedback." [#I-46]
- An owner of a majority professional services firm commented that not getting feedback on a bid and product trial was a problem for him. [#I-14]
- The African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm indicated that unfair rejection occurs regularly. He stated, "Usually it's, especially if there's an incumbent, and it's a high-profile contract ... we've had contracts that we've bid [for a public entity] ... 'best value' and we asked for that 'best value' to be explained to us and how we lost the contract ... and we never get those explanations .... It happens all the time." [#I-19]
- An African American owner of a MBE-certified specialty contracting firm reported on two major challenges. He said, "Bidding on jobs before the jobs start and not hearing back from the companies ... they say they just plugging numbers, and they just want us to give them a bid just to plug a number, then when it comes time to do the job, I don't hear back from the company or they might hire someone else." [#I-21]
- The white woman owner of a certified (WBE, DBE, SBE, CERT, TGB, MCUB, SUBP) professional services firm commented, "When calling, there are certain percentages that don't call you back ...." [#I-39]
- The African American male owner of a CERT/TGB-certified specialty contracting firm commented strongly, "... yes, not hearing anything back ... yes ..." [#I-40]

One interviewee and one focus group participant said that feedback was available and useful.

- Regarding bids without feedback, a focus group participant representing a public entity commented that firms that respond to RFPs often complain that they do not hear the result of their bid proposal. She indicated that the firms perceive that they cannot inquire about their bids, but they can. She added that the entity is trying to improve its transparency efforts regarding bid results. [#FG-1]
- When asked about submitting bids and receiving feedback, a white female owner of a DBE-, WBE-, SBE-, TGB- certified professional services firm, replied, “We go after the feedback.” She explained that although some agencies will give some feedback, indicating that she always “grab[s] the results and the scoring.” [#I-48]

She further commented, “That’s one of our biggest tools for our business is actually getting feedback when we don’t succeed and when we do succeed ....” She added that getting the feedback and meeting with the agencies has been helpful. “It’s how you learn ... what exactly they’re looking for,” [#I-48]

**Bid shopping and bid manipulation.** Business owners described experiences they had related to bid shopping and bid manipulation.

Some business owners reported evidence of bid shopping. For example:

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm indicated that bid shopping does take place at some levels, explaining the impact on firm: “If you’re working for a tier-two contractor you run the risk of you giving them your number and then them using someone else to shop that number.” [#I-19]
- A white female owner of a certified specialty contracting firm (CERT, SBE, WBE, DBE, MCUB) reported that her firm experienced bid shopping. She stated, “In the very beginning, there were times when [the general contractors] would contact us and it [took] a lot of time for [our] estimators to provide a bid .... We would never get a job from that general contractor .... They probably [would go] back to the person they [had] a really close relationship with and who they really [wanted] to do the job, and say, ‘Can you match this?’” [#I-44]

She added, “We’ve basically gone and talked to them, and just [asked], ‘Why ... are we not [getting the job]?’ And they’ll come up with multiple reasons for why we didn’t get it .... You just learn then [to not waste time]. There [are] some companies we just won’t bid to.” [#I-44]

- A white male representative of a white woman-owned CERT-certified specialty contracting firm, with respect to bid shopping, mentioned awareness of bid shopping. However, he conveyed that the firm recognized and ignored bid shopping “when they see it coming.” [#I-37]

- The white male executive director of a non-profit trade association reported witnessing bid shopping where a general contractor identified a low bidder and declassified the information to another favored business, so that second business could meet the first bidder's number. [#TO-4A]

This executive director of a non-profit trade association went on to describe one well-documented case of bid shopping adding that he has heard other stories second-hand. He reported on a general contractor that approached a member to accept a job only to undercut his price. Ultimately, based on industry reputation, that general contractor was, in turn, rejected by the owner. [#TO-4A]

One prime contractor conveyed that although, on occasion, owners shopped the firm's bids, her firm implemented specific measures to collect and compare subcontractor bids "apples to apples." This white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) reported that she was aware that bid shopping and bid manipulation happened "quite frequently." She added, "Because we're prime, owners will sometimes bid shop [our bid] .... We very strictly don't do that to our subs." [#I-45]

She went on to report, "We [get] multiple quotes for the same scope of work, but we ... come up with a ... scope list and line them up 'apples to apples,' make sure everyone's got everything and then go with the ... low responsible [bid]." [#I-45]

Some business owners and representatives spoke about specific instances of bid manipulation they experienced. Comments included, for example:

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider indicated, "That happens a lot to us because we're a minority contractor." He explained about bid manipulation, "They need our percentages ... but what they'll say is, 'Hey, your number's high, if you get to *this* number then we'll give you the job.'" [#I-19]
- A white female owner of a TGB-, CERT- and WBE-certified specialty contracting firm reported, "... there can be some manipulation to the bid process depending on how much of a timeline people have .... If they just need to put a number to it, then they'll put a number to it, and then they'll go back and get pricing from several different people, and ... after the fact ... grab the lowest bid from the people that bid to them. When their bid is due, they'll just write in a number, and then they go after the fact and get [something that's lower]." [#I-30]

When asked if she sees this type of bid manipulation frequently, the same business owner said, "I think it depends .... but there have been times where I thought for sure we had the project, and [then] we get a call saying, 'No, it went to somebody else.'" [#I-30]

When asked if anything can be done to stop this bid manipulation from happening, she stated, “I know that in some RFPs, you have to write in who your subcontractors are at the time that you submit the bid .... Sometimes you do not, sometimes you have like five days to do that ....” She added that reporting bids at time of submittal minimized opportunities for bid manipulation, “That’s kind of the only way that [manipulation can be prevented].” [#I-30]

**Stereotyping and double standards for minority- or women-owned firms when performing work, and any unfair treatment regarding approval of work for minority- and women-owned businesses.** Some business owners reported evidence of minority- and women-owned firms that were held to a different standard than white male-owned firms.

Some reported stereotyping for minority- and women-owned firms. For example:

- The African American president of a minority immigrant organization reported that there was not a level playing field for MWBEs or other small businesses. He indicated that the stereotype prevailed that MWBEs and other small businesses will not deliver. [#TO-7]
- Regarding double standards, the African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm indicated that stereotyping and double standards were applied frequently stating, “[For example], we were the only people of color on that project and so questions were raised: ‘Did we pass criminal background checks?’ And things of that nature. We work on a lot of projects where we’re the only folks of color and those issues come up all the time.” [#I-19]
- An African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm commented, “There’s always the times where you are speaking of the project or speaking of work and if you’re speaking to a male [and have to wonder] whether they’ll trust or believe in your knowledge or your technical abilities because you’re a woman.” She added, for instance, “I’ve had countless contractors, project managers, customers go to my Caucasian partners looking for answers that I had given them, not trusting that I gave them the right answers because I was a woman ....” [#I-22]
- A white woman part owner of a WBE-, DBE- TGB-certified professional services firm noted that as a woman-owned business, there was the perception that the firm had limited access to resources to take on the work. She reported continually having to “prove” ability and access to resources. [#I-32]
- A white female owner of a WBE/DBE-certified specialty contracting firm, regarding double standards for women-owned firms, reported, “... some people think they can take advantage of me ‘like I don’t know as much as the other guys’ .... But, I know my numbers, so I know if somebody’s trying to mess with ... me.” [#I-56]

Others described situations where they were held to a higher standard than others. Comments included:

- An African American president of a minority immigrant organization reported that there are double standards for minority- or women-owned firms when it comes to expectations. He stated, for example, that there was a “constant vigilance” with minority-owned firms being held to “unfair expectations or unexplained expectations.” He added that many minority firms failed as a result. [#TO-7]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm that primes “test you” just to see how far they can manipulate you. She reported, for example, ‘retainage’ clauses as an opportunity for primes to manipulate subs. [#I-44]

Some reported being treated differently than others or unfairly when conducting work. For instance:

- The African American female owner of a specialty services firm reported that she has personally observed harassment based on race and gender. She indicated that people “behave differently” towards her firm because it is both minority- and woman-owned. This, she reported, led to “definitely more pressure.” [#I-24]
- Regarding stereotyping and other unfair treatment, an African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm conveyed that whenever her firm got a contract and worked alongside a general contractor or project manager, who had not worked with her firm before, her firm was treated differently because it was not the contractor’s “standard subcontractor.” She commented, “... you hear lots of comments about ‘we have a well-oiled machine here,’ and, ‘... you’re going to mess the project up because you’re not part of their ... club of people that they always want to use.’” [#I-22]
- A white female owner of a WBE/DBE-certified specialty contracting firm reported that when she got work from contractors, she often got unfairly “nickel and dimed to death.” [#I-34]

A business owner reported that unions harassed his firm while on the job. This African American owner of a CERT-, TGB-certified specialty contracting firm reported that labor unions “forcefully” interfered with his work by harassing the firm. He lost several jobs, as a result of the harassment. [#I-40]

One trade association representative saw no double standards for minority- and women-owned firms seeking work. When asked if they witnessed any double standards for minority- or women-owned firms when performing work, the white male executive director of a non-profit trade association stated that there were more opportunities now for minority- and women-owned companies. He added that he does not see any companies expressing dissatisfaction or hardships in finding work because they are a minority- or women-owned. He instead stated that they get business because they are good at their work. [#TO-4A]

**Any knowledge of “fronts” or false reporting of good faith efforts.** A number of business owners reported knowledge of false reporting of business ownership or good faith efforts, for example:

- The white male person with disabilities owning a TGB/CERT-certified specialty contracting firm commented that he was aware of DBEs whose firms were put in their wives’ names. He indicated, for example, that one certifying agency informed him that if he transferred his firm into his wife’s name, he could certify as a DBE. He asked, “Why a woman would be more disadvantaged than ‘a man in a wheel chair’ would be?” [#I-12]
- A Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm indicated knowing that some subcontractors gave false reports about their participation. He added that some firms also provided false reporting of minorities in the field. He continued that goal percentages for minorities and females are also commonly falsified by contractors. [#I-18A]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm reported, “There are women-owned businesses [that] were white man-owned businesses.” He stated, “And then [when] they weren’t getting as much as they would have liked ... they put [business ownership] in their wives’ names and became woman-owned businesses ....” He continued, “... so the percentage of work that we could have ... gotten an advantage on was being taken up by those businesses.” [#I-19]
- Regarding good faith efforts, an African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm said that prime contractors are able to show a good-faith effort to hire a DBE, despite not having contacted them. He said that when required to perform a so-called “good-faith effort” to meet a DBE goal requirement on a project, primes will contact multiple “obscure” firms based “a hundred miles away” from the project location when there are DBE-certified firms that are in closer proximity to the project location. He indicated that this allows primes to follow good-faith practices without a sincere effort to hire DBEs willing to do the work. [#I-49]
- The Subcontinent Asian American male representative of an 8(a), WBE-, MBE-CERT certified professional services firm indicated a need for greater transparency with respect to good faith efforts. [#I-42]

**“Good ol’ boy” networks and other closed networks.** Business owners reported on whether they experienced any exclusionary practices or closed networks while conducting work in Minnesota.

Many business owners have knowledge of or direct experience with closed networks. [e.g., #I-17, #I-25, #I-44, #I-50, #I-64] For example:

- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider commented on facing resistance, saying, “A lot of folks, when we first started, even though we were certified, they would find ways to exclude us.” [#I-19]



- A Hispanic American male owner of a professional services firm indicated that “good ol’ boy” networks existed and were a “business hazard” that must be dealt with. [#I-68]
- An African American male owner of a specialty services firm stated, “‘Good ol’ boys’ [are] those that have the money, they ... contract [with] one another before coming down to the minorities ....” [#I-20]
- The African American male owner of a (MBE, SBE, TGB, DBE, SBE, CERT) specialty contracting firm commented, “There is still an ‘old boy’ networking system where they want to play with their ‘buddies’ or people who they have historically given contracts to.” He added that it is extremely difficult to break into a closed network environment. [#I-63]
- A Hispanic American representative of a minority-owned firm reported barriers to achieving success, “It’s a saturated market, and an ‘old boys club.’” [#AI-5]
- The African American male president of a non-profit minority trade association said, “Oh yes, there is some of that ... [closed networks] do exist ....” [#TO-9]
- The representative of an African American minority-owned professional services firm reported, “People have their network set up so it doesn’t allow any newcomers to join the action.” [#AI-2119]
- The white representative of a veteran-owned engineering firm stated that the construction industry is a very “small-knit” group of people. He indicated that there were big companies out there and a handful of construction managers and word spreads quickly through the network. [#I-1]
- An African American owner of a TGB-, CERT-certified specialty contracting firm reported that closed networks and “good ol’ boy” networks existed in the Minnesota marketplace. When asked if this has a negative effect on the minority- or women-owned businesses in the marketplace, he stated, “I would assume so ... the [‘good ol’ boys’] all know each other ....” [#I-13]
- The owner of a majority professional services firm reported that in such a small specialty industry he has experienced “many issues” with a closed network. He reported, “It’s been really hard, nearly impossible to penetrate in Minnesota because a lot of it is relationship-based.” [#I-14]

When asked specifically about a “good ol’ boy” network, the same business owner replied, “Exactly!” [#I-14]

- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty contracting firm reported on the existence of a “good ol’ boy” network, “Yeah it does [exist], it does for sure .... When we give certain companies bids, the same companies that have ‘cousins and brothers’ that work get the same jobs all the time ....” [#I-19]

- The African American owner of a MBE-certified specialty contracting firm indicated that the “good ol’ boy” network had a strong presence in the industry. He said, “When the job comes available ... the project manager or the supervisor on that job ... has a ‘buddy-buddy’ that they have to do the job, even though I might have bid on the job a year ahead of time. So, there’s a lot of that ‘good ol’ boy.’” He added, “Work that I should be doing, the ‘good ol’ boys’ will have their friends do it.” [#I-21]
- Regarding closed networks, an African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm stated, “Absolutely!” She explained that when they get a contract and they work with a general contractor or project manager they are treated differently because they are not the contractor’s “standard subcontractor.” She commented, “... you hear lots of comments about ‘we have a well-oiled machine here,’ and that somehow they are insinuating that you’re going to mess the project up because you’re not part of their ... club of people that they always want to use.” [#I-22]
- The African American female owner of a specialty services firm recalled an instance where she was highly recommended, but was not contacted about the work. She said that the work was given to another person who was “known internally.” She added, “It didn’t seem like it was because of [their] expertise, but due to the ‘relationship’ that they had.” [#I-24]
- The white female owner of the professional services firm reported that closed networks exist and do not let DBE and WBE firms join. She added that the architecture industry is a closed network and difficult to break into by women. [#I-32A]
- The white female owner of a certified (WBE, DBE, TGB, MCUB, SUBP) specialty contracting firm acknowledged the existence of “good ol’ boy” networks saying, “With the pricing, I could call the same supplier and they give it to the ‘good ol’ boys’ instead of me.” [#I-23]
- A Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm indicated that there is evidence of “good ol’ boy” networks. He reported that some cities and counties showed preference to certain companies over others, but he stated, “We’re too small to battle it, there’s nothing we can do.” He said, “It’s unfair, but I thank the Lord we’re doing okay.” [#I-18A]
- An African American male owner of a CERT-, TGB-certified specialty contracting firm indicated, “We see [‘good ol’ boy’ networks] all the time, [they’re] something we have to deal with ... we ignore it and move on. We see them a lot when the union gets involved, that is when [‘good ol’ boy’ networks] become a big problem.” [#I-40]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) said closed networks still exist. She indicated that her firm is “working around [them].” [#I-45]

- An African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm stated, “Oh absolutely. These networks are intact. We minority-owned firms are just starting to get crumbs. If you look at MnDOT, FAA, and city contracts, minorities are getting less than one percent of contract dollars ... We are still getting ripped off.” [#I-49]
- The white female attorney representing a chamber of commerce, when asked if there is a level playing field for women- and minority-owned business in the Minnesota marketplace, stated that in her personal experience, “No.” She went on to convey, “A lot of this goes back to the ‘good ol’ boys’ club ... it’s about who you know .... If you’re a recent immigrant, you know a lot less people than if your great-grandfather helped settle Saint Paul .... It makes a big difference.” [#TO-1]

Several other business owners reported that getting work was driven by “who you know.” Some reported “bias” as a result. Comments included:

- The white female owner of a certified (DBE, WBE, TGB, CERT) professional services firm remarked that it was clear to her early on in her business that obtaining work opportunities was driven by “who you know.” [#I-47]
- One white female representative of a white male-owned professional services firm remarked, “... it is who you know ... they will go to companies they’ve worked with in the past rather than give another company a shot at the work.” [#I-15]
- A white female owner of a WBE-, DBE-, SBE-CERT-, TGB-certified professional services firm reported that “... in our business, you get work based on ‘who you know.’” [#I-53]
- The Subcontinent Asian American male representative of a minority-owned goods firm said that “who you know is important.” He conveyed that being a minority was a disadvantage regarding closed networks, because minorities were often excluded from the “who you know” networks. [#I-66]
- A white representative of a veteran-owned engineering firm, reported when bidding, “So, I am at the mercy of my marketing .... Because general contractors usually stick to the guys that they usually ... do work with. On occasion, when they can’t find anybody else, I get a call for that type of work ... but in general, they usually stick to the guys they’re used to working with.” [#I-1]
- The white female with disabilities owning a professional services firm conveyed that “who you know” biases decision-making, “... most of the time, they already have ‘a person or a firm in mind that they want to hire.’” [#I-50]

For several interviewees, “good ol’ boy” networks spilled over from work environments to experiences with chambers, boards and other business associations. For instance:

- When asked about the existence of ‘good ol’ boy’ networks, the white female attorney representing a chamber of commerce reported that she knew of one closed network including only “older men” who have been in the industry since they were 18-years-old. [#TO-1]

She added that when searching for new chamber board members, those on the chamber board recommended people they already knew, “white men who do similar work.” She added that female and minority participation was missing. [#TO-1]

- The white female co-owner of a WBE-certified goods firm brought up one example of discrimination that she had faced, saying, “I was chair of a board for one of our industry associations. At night, because it’s ‘mostly men,’ what they would do is ... go to a gentlemen’s club to have drinks after the meeting.” She continued, “There’s not a clear way to get out of those situations, so that I would feel uncomfortable .... So yes, we [women] do get ‘excluded’ from [the “good ol’ boy” network].” [#I-27]

Some white male business owners said that “good ol’ boy” networks did not exist, and some minority business owners said they did but the situation was improving.” [e.g., #I-28, #I-30, #TO-11] For example:

- The white male sole proprietor of a veteran-owned consulting firm commented, “Good ol’ Boy” networks ... they are difficult to define.” He continued, “If you were in a field where everyone knows each other, it is a ‘professional network’ rather than a “good ol’ boy” network.” [#I-4]
- A white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT-, TGB-certified professional services firm indicated there are networks of preexisting relationships rather than closed or ‘good ol’ boy’ networks. He reported, “I know ... some customers already have ‘preexisting relationships’ with a vendor. And maybe that vendor’s not a targeted group, and they may want to still continue to work with them.” [#I-52]
- A white male owner of a specialty contracting firm, regarding closed networks or ‘good ol’ boy’ networks, stated, “I don’t think there’s such a thing as a ‘good ol’ boy’ network. I think there are people [who] we have had contact with for 40 years, and they know our reputation. That’s not a ‘good ol’ boy’ network.” [#I-51]
- An African American part owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm reported, “I think there has been a “good ol’ boy” network; it was much more prevalent in the past than it is now .... I do not believe it is quite as obvious today as in the past. It is all about price instead of who you know.” [#I-38]

- According to the Hispanic American male owner of a MBE- DBE-, MUCB- CERT-, TGB- certified professional services firm, things are improving with respect to the “good ol’ boys network” as it is not so strong. He offered that a younger generation that tended to be more inclusive was replacing the older generation of “good ol’ boys.” [#I-43]

Some business owners and representatives reported “secret societies” and other closed networks for getting work from public sector entities that advantaged one firm over another. For example:

- The African American president of a workforce trade organization remarked that MnDOT and Met Council rely on large firms for their construction projects. He said that MnDOT and the horizontal construction industry in Minnesota “is a secret society.” He added that MnDOT spends \$1 billion each year and hires four to five companies “that ... do all of the work.” [#TO-6]

He added, “It [MnDOT and horizontal construction industry] really isn’t a competitive environment” and that there is “double talk” between the Department of Civil Rights and MnDOT regarding hiring goals, “no one is punished.” He commented that until minorities shut down job sites, exclusionary attitudes would not change. He added, “None of the enforcement agencies have any teeth.” [#TO-6]

- A white female owner of a WBE-, DBE-, SBE-CERT-, TGB-certified professional services firm reported, “... MnDOT and Met Council say they are fair ... but the people making the decisions about who gets work ... there’s always some ‘bias’ there ....” She added, “... certain people know how to work with certain people.” [#I-53]

One veteran, and some other white male business owners across industries, reported a “tilt” in favor of firms “not” owned by white males. For example, the white male sole proprietor of a veteran-owned consulting firm commented, “I believe that there is not a level playing field; I believe it is tilted in ‘their favor.’” He continued, “Affirmative action is there due to long standing discrimination for people of color. The same is true for hiring practices. I see in my field that the hiring for minorities, women and ‘disabilities’ is better than for ‘white men’ ... if there is a problem, he added, the State will fix it.” [#I-4]

**Other related insights.** A number of business owners and representatives gave other input on whether there was a level playing field in the Minnesota marketplace.

- The Asian American representative of an immigrant business association, when asked if he has observed any evidence of unfair treatment when membership pursued bid opportunities or performed work in the Minnesota marketplace, stated, “I have not seen any yet, [because the members] have not gotten to that ‘level’ yet. I hope that when we’re ready, [an unlevel playing field is] not part of the challenge that we’ll face.” [#TO-11]

The same representative, when asked if he was aware of any unfair treatment or disadvantages for small businesses in Minnesota, indicated that not having enough resources or business assistance information disadvantaged small, minority-owned immigrant businesses. He went on to say that, for example, many of the organization's immigrant members felt that they were not given enough information and notice that the 2018 Super Bowl would be at US Bank Stadium; with not enough lead-time some missed out on registering as a vendor. [#TO-11]

- Regarding a level playing field, the Subcontinent Asian American owner of a professional services firm said that “officially and formally” there is an effort to try to engage minority- and women-owned businesses, but questioned whether [public sector entities] keep on top of this. He indicated that he has not seen this happen, but wishes it would so they could get extra work and not struggle. [#I-28]
- An African American male owner of a DBE- certified goods firm commented that he faces challenges with the playing field since his firm is in a highly-specialized industry where the competition is only large competitors. [PFP#28]

#### **D. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Minority-owned Businesses**

The study team asked business owners to report any evidence of unfair conditions. Topics included:

- Inequities in financing;
- Evidence of discrimination specific to race and ethnicity; and
- Mistrust of minority-owned firms.

**Inequities in financing.** As described in Part A and B of this appendix, many minority business owners reported financial challenges and limited access to financing. Some reported that minority business owners cannot get financing.

Business owners and representatives reported inequities in financing that particularly disadvantaged minority business owners. For example:

- An African American president of a workforce trade organization reported that “lending practices are still ‘exclusionary’ ... they won’t give black folks a loan.” [#TO-6]
- The African American male owner of a specialty services firm, when asked if he has any experience or knowledge of unfair treatment specific to minority-owned firms in his industry, reported that for businesses to “strive and succeed,” they must have “the funds [to do so].” He continued, “Most of the minorities, based on my knowledge ... don’t have [enough financing] to start the business in the first place. So, [limited access to financing] is a big factor that is really impeding their progress.” [#I-20]

- An African American representative of a minority-owned professional services firm reported as a barrier, “Access to capital, having a seat at the table ... and your skin.” [#AI-76]
- The Native American female owner of a closed construction firm indicated that in her experience, the people “within the system that the State oversees [were] completely racist and sexist.” [#I-61]
- The Native American male representative of a non-profit minority education and training association reported unfair treatment in procuring financing, stating, “There are still some ingrained, racially motivated prejudices at play that has prevented community members from procuring capital to start small businesses .... The long shadow of a very poor educational system has handicapped our community’s capabilities to branch out and start these small businesses.” [#TO-8]
- An Asian American male president of an Asian American female-owned general contracting firm commented that there is no level playing field for minority-owned firms. He remarked that though his firm is established, they still experience discrimination in revenue, relationships and other areas. He added that race neutral programs can create a glass ceiling that defeats the intention of those programs. [PFP#22]
- The African American representative of a minority-owned specialty contracting firm reported, “Having a minority-owned business creates a big challenge in terms of obtaining credit.” [#AI-90]
- A minority business owner participating in a focus group reported on “capital intense” projects in public sector that limit bidding opportunities for minority-owned firms. [#FG-3]

Some immigrant business owners faced discrimination through cultural differences in lending practices. A male representative of a minority immigrant business association stated that financing is particularly challenging for immigrants from faith-based cultures that disapprove of loans secured with interest. He explained that there are not enough banks that accommodate cultural differences in lending practices. [#TO-5]

**Evidence of discrimination specific to race and ethnicity.** Business owners and representatives commented on any evidence of racial and ethnic discrimination.

Some business owners reported “overt” discrimination, and others, more subtle “covert” discrimination. Examples follow:

- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm reported that discrimination exists. He reported overt racial stereotyping of his workers of color. [#I-19]

He also conveyed that on many projects, his workers were the “only folks of color and those issues came up all the time.” He then emphasized that discrimination also existed in hiring. He conveyed knowledge of hiring for projects where the hiring agent excluded black workers, by selecting only white workers. [#I-19]

- Commenting on the racist atmosphere of education in the State, a Native American male representative of a non-profit minority education and training association indicated that for minority students seeking education and training, “Unfortunately, the education system here in Minnesota is antiquated model predicated on the industrial revolution and really it feels very ‘racist at times’ if not wholly ‘ethnocentric.’” He added, “The educational system is outdated, and it’s not suited for a truly multicultural approach.” [#TO-8]
- An African American representative of a minority-owned professional services firm reported discrimination, “... people judge you based on the way you speak, and the clothing you wear. Also, it’s who you know, and not what you know, the “buddy system.” [#AI-62]
- A representative of an African American minority-owned construction firm reported hardship from, “Big companies controlling the industry.” [#AI-2254]
- The immigrant African female owner of a goods firm indicated that at the space she currently rents, “One of the neighbors... has made ... racial comments here and there, and we’ve had to address it, but ... you can’t always change [someone else’s] ignorance ... there is not a whole lot you can do about it.” [#I-58]
- A Hispanic American representative of a Latino leadership organization, regarding unfair payment, reported, “I think a lot of people figure that since they’re contracting with a Latino business, they can do a different ‘entry-level’ contract with them. In other words, pay them less.” He reported, to circumvent discrimination, there was a need for larger contractors to have set fee for all subcontractors that did not unfairly disadvantage Hispanic-owned businesses, in particular. [#TO-2]



- A public forum participant, a male representative of a contracting firm, commented that many public sector contracting opportunities require firms to be union shops, and most small and minority-owned firms are not unionized. He added that public opportunities are therefore “slim to none” for small and minority-owned firms. He reported that if small or minority firms could gain access to public sector opportunities as subcontractors, it would “level the playing field.” He added any goals in place were not providing a level playing field because the same minority contractors are getting the work “over and over again.” [PFP#29]
- An African American male president of a non-profit minority trade association reporting on any evidence of discrimination stated, “Oh yes ... a lot of the challenges are ‘subtle,’ they’re not obvious ... but yes, absolutely.” [#TO-9]
- A Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm reported that he has experienced “indirect” discrimination. As he reported having a privileged upbringing from Mexico, however, he did not “worry about what people said.” [#I-43]
- A white female owner of a DBE-certified professional services firm remarked, that based on her experiences and those of African American female colleagues, “there is not a level playing field.” She further commented that “unconscious bias” exists and she has “seen it.” [PFP#25]
- When asked about unfair treatment, an African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider commented that minorities were shut out of projects dominated by union agreements. He reported, “It hurts the smaller companies, even though we have better training, we have better certifications, we have better equipment, it doesn’t matter .... Once it has a union project labor agreement on it, we’re not allowed to participate.” [#I-19]
- A representative of a Subcontinent Asian American minority-owned firm reported, “Religious discrimination and explicit bias.” [#AI-2122]
- An African American male owner of a specialty services firm, when asked if he has any experience or knowledge of discrimination specific to minority-owned firms in his industry, stated, “... [disadvantages], based on what is going on around the country.” [#I-20]
- One representative of an African American minority-owned firm, when asked about barriers to business success in Minnesota, responded with a one word, “Discrimination.” [#AI-2256]

- An African American focus group participant reported that the ‘less blatant’ discrimination, common to Minnesota, was as damaging as more ‘blatant’ discrimination, perhaps seen in other regions of the country. [#FG-4]

He added that in Minnesota, people “struggle” with talking about racism. He reported, “White people will have a tendency to be quiet and shut up.” He conveyed, “You have to get comfortable talking about it [racism].” He also commented, that whites, instead of “talking about it [racism]; want to remain “Minnesota stoic.” He reported a “passive aggressive” environment that was not “Minnesota ‘nice,’ it’s Minnesota ‘mean.’” [#FG-4]

The same focus group participant commented that the increased population of persons of color is rapidly changing the demographics of Minnesota as well as the services needed to serve the population. He said, “[To combat discrimination] institutions have to develop the core competencies to affectively deal with communities of color ....” [#FG-4]

- A representative of an African American minority-owned services firm reported a barrier faced by minority-owned firms regarding proposal and contract submittal. He stated, “As a minority owned business, it takes us extra steps to be awarded ... our proposals and contracts are never accepted the first time and we have to resubmit two or three times before it gets approved.” [#AI-2223]

A number of business owners reported harassment or other unfair treatment or unfavorable working conditions while conducting work. These included:

- The African American male owner of a specialty services firm reported that the work that he performed in the past for Met Council was not a very good experience; he indicated there was unfair “oversight” and “unnecessary demands” throughout the process. [#I-20]
- One business owner reported that unions harassed his firm while on the job. The African American owner of a CERT-, TGB-certified specialty contracting firm reported that labor unions were barriers to his work. He stated, “... it would be the labor union. They were interfering with our work by harassing [us.] We do not have the capacity to join the union, we do not have the financial resources to join the union. They were forceful. They made us lose jobs or we were removed from jobs that we were hired for even though they were not union .... I have lost a few jobs due to the union, two in 2017 and one in 2016.” [#I-40]

**Mistrust of minority-owned firms.** Some minority business owners reported an over-arching “mistrust” of people of color and that minorities were not be trusted to perform.

Some business owners and representatives reported issues with “trust” specific to race and ethnicity. Examples included:

- An African American male owner of a specialty services firm, when asked if firms in his industry have difficulty finding contracting opportunities with the participating entities, stated, “Yeah, we still have [difficulty].” He went on to say it is important to be ‘trusted’ in his industry, and indicated it can be difficult [as a minority-owned business] to find the opportunities necessary to gain that trust. [#I-20]

He added, “... nobody knows us in the State, for example, and we are failing ....” He added that the participating entities should “give [them] shots so [they can] be known and be a ‘trusted’ partner.” [#I-20]

- A white female executive director of a non-profit women’s organization commented that race and wealth are an advantage. She said, “We have seen with our entrepreneurs of color ... some bias in their ability to do business outside of their community. They don’t have that ‘trust’ ... outside of construction .... for ... entrepreneurs of color, there is always that obstacle of race that they have to transcend and be ‘twice as good or three times as good as someone else to get the business.’” [#TO-3]
- The immigrant African female owner of a goods firm indicated that she hesitated to report the ownership of her business. She stated, “Being a minority-owned business ... sometimes you don’t always want people to know it’s a minority-owned business in a ‘weird way,’ because you feel like there are going to be barriers [based on race and ethnicity] ... so sometimes you let people ... make their own assumptions [about the business ownership].” She added, “There is [also] discrimination being perpetrated by people of color against other people of color.” [#I-58]

Other business owners and representatives reported that capability of minority-owned firms was routinely challenged. For example:

- The African American part owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm reported, “I believe we have been treated unfairly. Many times, when people understand that we are an African American company they believe that it affects our ability to deliver the work ... that bias has been a factor.” [#I-38]
- An African American partial owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services firm reported, “There’s a perception of a minority-owned company being ‘less capable’ than a majority-owned company.” He went on to report on his work with Fortune 500 companies, for example, where “the perception was that we were not as capable ... the perception was there.” [#I-38]

- The white male representative of an Hispanic American male-owned certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm, with respect to unfair treatment when pursuing opportunities in Minnesota, he identified one public entity, for instance, that was very difficult. He reported a “cultural thing” going on, because the entity conveyed that minority contractors “cannot do things right,” so they created assessments to indicate that minority contractors had not done things right. [#I-18]
- The white male representative of a Hispanic American-owned MBE-, DBE-, SBE-DBE-, MCUB-, SUBP- TGB-, CERT-certified professional services firm reported that working with MnDOT was challenging. He said, “There can be a little disconnect there.”

### **E. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Women-owned Businesses**

Women business owners and others reported on any evidence of discrimination or unfair working conditions. Topics included

- Misogyny and male-dominated industries;
- Evidence of discrimination specific to women; and
- Mistrust of firms owned by women.

**Misogyny and male-dominated industries.** Several women-business owners reported day-to-day challenges working in male-dominated industries, for example:

- Regarding closed networks, the white female owner of a DBE-, WBE-, SBE-, TGB-certified professional services firm commented, “... this industry, engineering, is still very male-dominated ... people sometimes don’t understand ‘why I’m here’ and we have to ... explain, which I think is wrong.” [#I-48]
- A white female owner of a WBE-, DBE-, TGB-certified professional services firm reported, “You go into meetings and it’s a room full of men sitting in a conference room and you walk in and you kind of get the smirks and I think [it was like this] from the first day I graduated.” [#I-32A]
- The white female owner of the professional services firm added that because as a woman engineer in a male-dominated field, she faced discrimination. She indicated that she also faced discrimination from being a woman-owned business. [#I-32A]

- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm indicated that her female-owned firm had to overcome misogyny directed by clients. She reported, “We ... overcome that.” She reported that one of her employees is an architect who goes “out onto the field [to] field measure” and gives feedback to clients. She added, “When we get out there and they actually meet her ... it totally changes their attitude towards us ... she knows the ins and outs all the way through the whole construction [process].” [#I-44]
- Regarding misogyny, the white female executive director of a non-profit women’s organization indicated, “I am going to be honest with you. Being a women economic agency, I see a lot of discrimination. We serve more women, more women of color and low-income [women] at a lower cost than any other company that is led by men, but we get the least amount of money. I find that fascinating.” [#TO-3]
- The white female owner of a specialty contracting firm reported, “I’m a woman in a man’s world,” She said, “Very few women own trucks and are out there driving them themselves, you know?” She commented that some men that behaved negatively toward her because she was a woman, but “that’ll be the same anywhere.”

She added that each job and each day was different and involved dealing with different temperaments and attitudes. However, “I won’t say that it’s all the same whether you are a white male or a female. There are those people who just don’t think that women should be out there,” stated the interviewee. [#I-59]

**Evidence of discrimination specific to women.** Business owners and representatives reported on any discrimination.

Interviewees reported both “blatant” and “covert” discrimination that was gender-based. Examples included:

- While in a male-dominated industry, a white female owner of a [closed] DBE-, TGB-certified specialty contracting firm stated that “the ‘good ol’ boy’ mentality still exists [in contracting].” She conveyed, “I was the [company] president ... There were times where I would have to have my husband, who was the vice president of the company, talk to the contractor, because they didn’t want to talk to [a woman]; they wanted to talk to ‘the man.’” [#I-65]
- A white female member of the public remarked at one public meeting that her sister had a “horrendous” experience when she was required to hold a heavy drill over her head while working on a construction project. She commented that the [specialty contracting] company did not want her to succeed in the construction industry and she had to file a legal dispute as a remedy. [PFP#8]
- A white female owner of a WBE/DBE-certified specialty contracting firm reported having to get used to “the guys, and the way they ‘talk’ ... It’s a lot of ‘F-bombs’ here and there that’s just part of the job.” [#I-56]

- The white female person with disabilities owning a professional services firm reported, few male purchasing agents engage her services. She offered, “I will say I’ve had more longstanding relationships with women clients .... She reported very little work when a man was the hiring agent, “that is how it has happened.” She explained, “More of my client contacts, especially those that have been long-term have been women.” [#I-50]
- An African American male president of a non-profit minority trade association recalled a woman-owned painting firm that had experienced unfair treatment. He reported knowing that the owner of the firm was specifically not given the necessary information she required on a particular project, and what little she did receive was late. [#TO-9]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm stated, “There are certain companies that might be more difficult to deal with .... We have definitely had to stand up for ourselves and show that ... we will fight for that last bit of retainage.” [#I-44]

She continued, “I think sometimes they test you just to see ... if they can get away with that a little bit.” She added, “We don’t [walk away from it].” [#I-44]

- The white female owner of a DBE-WBE- SBE-, TGB- certified professional services firm, when asked if there was unfair treatment of women-owned firms, reported that women-owned firms were not invited to professional events. She stated, “I’m ... not getting invited, but [my husband] is ... [and] my gut feeling is that if it was me [at the event], I would be uncomfortable there.” [#I-48]

She commented knowing of on an instance at an event where a female county engineer was introduced to a man from another state, and he said, “You’re a county engineer?” [#I-48]

The same business owner said, “[Discrimination is] there in the industry. I think it is getting better and I think ... that is a generational ... thing, but those are the people out at the events .... It’s still very male-dominated.” [#I-48]

She further reported bringing women’s t-shirts as well as men’s, when attending one event. She added, “It’s a small thing, but it’s a ‘big thing’ because when all you bring [are] things for men, what’s the message that you’re sending?” [#I-48]

For one woman, discrimination included sexual comments from public sector project managers and others. A Native American female owner of a closed construction firm who now owns a professional services firm commented, “I had [Minnesota Department of Natural Resources] managers who [were] in charge of the bids, and four service administrators, literally sit me down in bid opening and ask me if my business partner was a male, [if he] was actually ‘sleeping with me,’ if he was my husband [and] if he was actually doing the work.” [#I-61]

She went on to say, “It happened over and over ... even [with] the same people .... Clearly, this general contracting license is in my name. I went, studied and took the test. I own this license ....” [#I-61]

She further added, "I'm a very feminine-looking woman. People tell me 'I'm very pretty,' and that would also get in the way of having genuine conversations about construction issues, the bidding process [and] qualifications." [#I-61]

Another woman owner was subjected to sexual advances from a male engineer that resulted in his dismissal, and from others in the industry. This white female co-owner of a WBE-certified goods firm commented, "You just never know where [discrimination is] 'gonna' be. I mean we own this company, we have had an engineer that worked here before and when I passed by the front office he attempted to lure her in, "Sit right here!" She added, "He got fired." [#I-27A]

The same business co-owner reported additional industry-related sexual harassment. She conveyed, "We've had discrimination where [at a] ... trade show and a guy shouts out, 'Hey everybody, the blondes are mine!'" [#I-27A]

She went on to report being hazed and ridiculed at trade shows recalling, "There was a luncheon at a trade show and ... no one would sit by [her female co-owner and her] ... until there was no possible choice." She continued that the men then inquired if these two women were "partners." [#I-27A]

A male representative of a minority immigrant business association reported added barriers that immigrant women business owners faced in Minnesota. He stated that many women immigrants went into business at a higher rate than immigrant men did. He added, however, that women faced obstacles to getting loans, and, with traditionally more limited education than men, language and cultural barriers that made success more difficult for immigrant women. [#TO-5]

He added, as an obstacle, that, traditionally, female member immigrants were encouraged at home to do housework and take care of large families. He remarked that limited "power," and a "shy and reserved" disposition disadvantaged many of their immigrant women business members when compared with the men." [#TO-5]

A representative of a woman-owned professional services firm reported a barrier to bidding specific to women-owned firms. She stated, "There is no way to identify us as a women-owned business in the proposals/applications from the State. Both minority-owned and veteran-owned businesses have 'forms' where they are identified and called out to agencies and contractors. I include the information, but I doubt that I ever get the extra help I'm supposed to get in scores." [#AI-2203]

Although one minority contractor perceived that race-based discrimination existed; he did not believe that discrimination held true for women. An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm commented that although discrimination exists for minority firms, regarding WBE-certified firms he conveyed: "Nope... there is no unfair treatment ... [women] only have advantages. And those advantages are now that the construction companies that they were doing work with before, they can continue to do work with them ...." [#I-19]

**Mistrust of firms owned by women.** Several women reported being innately mistrusted and viewed as “incapable” until proven otherwise.

Many women business owners reported being questioned about their capabilities to perform their work, when men were not questioned. For example:

- For a white woman-owned professional services firm, “There’s a bias on who people will think will be a software developer, and that expectation would be a male in their 30s to 40s, and ... that affects the ability to gain work as a female.” [#AI-42]
- One white woman representative of a white woman-owned firm reported as a barrier, “Just being taken seriously as a woman.” [#AI-141]
- A white female owner of a WBE/DBE-certified specialty contracting firm reported that “... being a woman in a man’s world .... it took a few years for me to be taken seriously.” She added that not being “taken seriously” as a women-owned firm was a barrier for women-owned firms in her industry. She continued that she had to work hard, “... so they know you’re legitimate and you’re going to show up and do the job.” [#I-56]
- One white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP said, “I would be able to tell you a lot of stories about just being ... ‘written off’ because you’re a woman-owned firm, or a woman in the trades. [Some think] you can’t possibly know that much.” [#I-45]

She continued, “There can be a ‘dismissive quality’ ... or a ‘testing’ to see if you know how this joint is going to go together, or how this flashing detail is going to work ... stuff like that.” She went on to say it is not worth “focusing on.” [#I-45]

- The white female co-owner of a WBE-certified goods firm commented, “What we hear often is that somebody will say once they get to know us, ‘I had no idea that a woman could know that much about [the specialty goods],’ or ... ‘You knew anything.’” [#I-27A]
- The white female owner of a WBE-, DBE-, TGB-certified professional services firm reported a recent incident where a man questioned whether she was ‘capable’ of doing the job. She noted that she can “take it to the table any day.” She also recalled that on her first project, a man yelled at her for making him redo some concrete rebar not installed to the specifications. She stated, that he called her boss in retaliation to find out what “she” was doing on that site; later he had to apologize. [#I-32A]
- The white female with disabilities owning a professional services firm said, “... I’m taken ... less seriously because I’m a woman.” She continued, “... it’s the same issues that women faced and minorities faced in any industry, in that ... most of the companies have been started and developed by white men. And ... they want to ... hire the people they’ve met and they know, and they know more people that are like them ....” [#I-50]



- The white female owner of a DBE-WBE- SBE-, TGB- certified professional services firm reported, “I think MnDOT is probably, sadly, the organization that underestimates us the most.” [#I-48]

## **F. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Small Businesses**

Business owners and representatives across industries reported an environment that unfairly disadvantaged small businesses, while giving preference to large businesses. Small business owners reported on a myriad of topics. A summary follows.

- One small business owners reported on the “catch-22” of not being known by key decision-makers, because of their small size, and thus not getting a chance to show what they can do. The African American female owning a MBE-, SBE-, WBE-certified professional services firm commented on unfair treatment towards small firms in general, saying, “It’s having a level playing field, and ... access to beginning opportunities to demonstrate that you have the capability to do this.... So, for instance, you get on all these lists, then you know you’re on the list but you never get opportunity because the project managers don’t know your firm. And they don’t know your firm because they haven’t given you opportunity.” She added, “Until you start making those relationships ... it’s difficult to get a chance.” [#I-17]
- A white male veteran owner of a professional services firm reported that unfair treatment of small firms existed. He reported seeing large firms marketing their way to projects with “the dog and pony show” while smaller firms, such as his, struggled for consideration. [#I-3]

When asked about the existence of closed networks, he reported that many public sector projects required extensive, and in many cases extraneous certification. He indicated that this system created an environment in which only large firms with many certifications and specialized licenses could successfully procure large numbers of government projects. [#I-3]

He also reported a stigma against small firms, noting that the State especially gave strong preference to large firms based in the Twin Cities. He said, “There [are] stereotypical attitudes that outstate [small, professional services firms] can’t perform as well as ‘ultra-large’ companies down in the Twin Cities.” [#I-3]

- The representative of a majority professional services small business reported on firm small size as a barrier in public sector: “Preference is often given to the large design firms with strong personal ties to municipal agencies, making it nearly impossible for smaller design firms to obtain consideration for public RFPs, though we’re just as qualified. The State should impose a yearly spending limit on single consultants, so others have a chance.” [#AI-1097]

- A white female owner of a WBE-, DBE-, TGB-certified professional services firm with respect to work with the participating entities, indicated that “bigger projects go to larger firms.” She noted that with MnDOT, the same thing happens. She said that MnDOT is “off the radar” for them, for example. [#I-32A]
- The Hispanic American owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm commented that there is a negative perception that smaller firms cannot perform as well as large firms. [#I-67]
- A majority small business owner reported as a barrier, “Perception of the ability of a small firm to deliver on a large project. We have 11 on staff now and can handle more than three large projects at the same time. Hard to overcome the perception that we can’t.” [#AI-1096]
- The representative of a white woman-owned professional services firm reported, “As a small business owner ... the biggest barrier is competing with some of the bigger providers ... it’s more of a perception [of small as less able].” [#AI-1075]
- The white female person with disabilities owning a professional services firm commented that unfair treatment exists for small firms. She said, “... sometimes it’s more difficult for a small firm to get the work than it is for a larger firm.” She added, “... some people are more comfortable with a large firm. I was ... doing contract work for a company for many, many years and had ... deep knowledge of the company .... Everyone there liked the work I was doing, but then a new [department] director came in and wanted to work with a large firm. So, the amount of work I got from them ended up being significantly lessened.” [#I-50]
- The white male veteran owner of a DBE-certified specialty services firm, when asked if being a small business made it harder for him to talk about rates, said that when bidding for state-funded projects, all that the State requested just his “rate sheet,” immediately putting his small firm at a disadvantage. [#I-2]
- The African American owner of a MBE-certified professional services firm reported that bidding opportunities in the Minnesota marketplace were restricted in his industry by the “number of resources required” making bidding by small businesses challenging. [#I-16]
- For a woman-owned supplier small business, breaking into the medical supply field was a challenge. She reported, “Government bidding processes are set up for large companies in the medical supply business.” She gave the example of a that contract has only been awarded to the “three biggest national vendors.” She added, “There are no set asides for small business or targeted businesses.” [#AI-2168]
- For a representative of a majority contracting firm, “access to capital as a small business” was challenging. [#AI-31]

- A white male representative of a majority professionals services firm indicated as a barrier, “Being a small business ... the high healthcare costs as an independent small business.” [#AI-39]
- A majority construction company representative reported that small businesses should be given the same preference as women-owned businesses. [#AI-2258]
- When asked about experiences with discrimination of minority-, woman-owned or small firms, a focus group participant from a public entity reported that “it is not size ... pricing is an issue ... bigger firms can get things at a lower price ....” [#FG-1]
- Another focus group participant from a public entity added that in addition to pricing for smaller firms, scope and amount of work are factors. [#FG-1]

### **G. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Businesses Owned by Persons with Disabilities**

Although businesses owned by persons with disabilities shared many of the same challenges as other businesses interviewed, several business owners and representatives reported barriers unique to businesses owned by persons with disabilities or those businesses employing persons with disabilities.

- A white male person with disabilities owning a TGB- and CERT-certified specialty contracting firm reported that he faced many mobility challenges, and even more so at start-up. He indicated that his “wheel chair” use made bidding and “getting around job sites” particularly challenging. [#I-12]
- One white female owner of a goods and services firm serving and employing persons with disabilities commented on clients’ responses to a hearing-impaired staff member. She indicated that her employee had cochlear implants. She stated that an “initial judgement” of her from clients perpetuated. However, she added, “Give her [employee] five more minutes of communication and that judgment gets annihilated ....” Unfortunately, however, the business owner indicated that “sometimes [clients] don’t give them [that] time.” [#I-60]
- The representative of a white woman-owned construction firm reported, “We are a small organization and all of our work is performed by disabled adult contract workers; we function as a “social enterprise.” If disabled workers are forced out of “sheltered workshops,” we will cease to exist; not all disabled adults are able to integrate as workers in the community and some need opportunities to have meaningful work in [their] house which is what we provide.” [#A-2152]

- The white female person with disabilities owning a professional services firm reported managing a business and a recent disability. She stated, “It’s difficult because of the restrictions that social security puts on what [income] I can make ... within a certain ... time [period]. [The limitation] makes it difficult for me to bid on contracts ... because [social security] limits it to so much [income] a month.” She added, “If [the income limitation] was over the course of a year, I could get a big project and just do one big project. But, it’s difficult too to find [business contacts] who want to deal with the limitations of what I can make each month.” [#I-50]

She added that bidding on public sector jobs was not “worth her time” recently, “Primarily, the [opportunities] I’ve seen lately using email process have all been ... construction jobs, [which] aren’t appropriate for me at all.” [#I-50]

When asked how she decides which public sector opportunities to pursue, she responded, “Unless I know the person that is in charge of the contract, I won’t bid on it because it’s too much trouble. And most of the time, they already have a person or a firm in mind that they want to hire.” [#I-50]

- A white woman business owner with disabilities reported that having multiple sclerosis made achieving success a challenge, “I have multiple sclerosis and that limits me.” [#AI-1079]

#### **H. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Veteran-owned Businesses**

Veteran business owners and others reported on the pros and cons of veteran-owned business status. Some reported that there were limited opportunities to bid or propose on projects with preferences for veteran-owned businesses. Others reported that veteran status advantaged their firms.

**Disadvantages related to veteran-owned businesses status.** Veteran-owned businesses shared some of the same challenges as small businesses (e.g., “mistrust”). A few interviewees reported limited opportunities that specifically gave preferences to veteran-owned businesses:

- The owner of a VOSBE-certified specialty services firm reported not being trusted, “Oh the challenge is trying to get contractors to ... ‘trust’ us to provide quality laborers.” [#I-11]
- A white male veteran owner of a professional services firm reported, regarding having veteran status, “We have gone after projects with local firms ... for projects ... with the State of Minnesota and our offices were within a block or two ... from the project area .... We did not get the project [although] I have veteran preference.” He conveyed, “We ask for the grading sheets ... we see ... on the grading sheet that they copied ... had erased the grades and someone else had wrote in a different grade on the grading sheet in different handwriting, so that the other company got the job.” [#I-3]

- The white female representative of a white male owned VO-SBE-certified specialty services firm reported, "... you look at even the MnDOT [projects], ... almost every project they have out there they have DBE goals ... out of 20 projects they have out there, maybe one or two will have a veteran goal." [#I-11A]
- A white male owner of a VOSBE-certified specialty services firm reported challenges procuring contracts because veteran-owned goals are not set for most public projects. He remarked, for example, "The State of Minnesota does not institute any veteran goals, the only state entity that does is MnDOT." [#I-11]

**Business advantages of veteran-owned business status.** Comments included:

- The white representative of a veteran-owned engineering firm reported that he did not consider being a veteran-owned business a disability; instead, he considered it an asset because of the positive view people have about veterans. [#I-1]

He added, "There is a pretty good state set-aside for veteran-owned companies on some of these projects, and the general contractors usually see the value and pull in a veteran- or minority-owned company." [#I-1]

- A white male owner of a SDVOSB-certified specialty contracting firm, when asked about unfair treatment when pursuing work, commented, "No I do not think so .... we are the only veteran-owned [specialty consulting] company ... the next closest one is in Ohio ...." He added that primes and contractors solicited his services in order to meet goals. [#I-6]
- The white male owner of a SDVOSB-certified specialty contracting firm stated they have worked on State projects where they have been contracted by contractors because there was a veteran goal. He reported, positively, that many of the MnDOT highway projects have a "vet goal" and because of that, they do not have a hard time getting work. [#I-6]

## **I. Working with One or More of the Participating Entities**

Business owners and representatives discussed their experiences with the participating entities:

- State of Minnesota
- Minnesota Department of Transportation;
- Metropolitan Council;
- Metropolitan Airports Commission;
- Minnesota State;
- Mosquito Control District;
- City of Minneapolis;
- City of St. Paul, including Housing Redevelopment Authority; and
- Hennepin County.

**Several business owners reported their successes and failures in seeking and securing work with one or more of the participating entities.** A few of those comments follow:

- An Asian-Pacific American male representative of an immigrant business association reported that some members have engaged in professional services contracts such as accounting and IT. He commented, “I would love to know what contracts [are available] from the State so we could pass them on to those professionals.” [#TO-11]
- The Hispanic American part owner of a Hispanic American woman-owned professional services firm reported barriers to working with the City of Saint Paul, including multiple layers of people; while one person may approve work, another person requires changes. He also commented on the restrictive budget. [#I-5]
- A Native American male representative of a MBE-certified goods and services firm commented that he wanted to be interviewed about the process for getting on the State vendor list (pre-approved vendor list), which he indicated was very frustrating. He said that the State had issued an RFP in 2012 for a range of services. He added that because he joined the company after the issuance of the RFP, the company did not get on the vendor list. He reported that 11 firms were approved, and each year since the first contract period, the State has simply extended the contract period another year. He conveyed, for his company, this meant that the firm missed a window in 2012, and was not given a chance to get back onto a list since then. [#I-33]
- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm reported her business has not worked directly with Minnesota State. She added, “I’ve been to the procurement fair two years in a row, and have not really gotten anywhere with it. I’ve met with their [specified departments] internally and have had conversations, but there haven’t been any opportunities that have come up that I’ve been able to pursue with them.” [#I-30]

The same business owner indicated that her firm has bid on State of Minnesota contracts with no success. She said, “With the State of Minnesota, I’ve looked at different bid opportunities, and nothing has worked out thus far that we’ve won.” [#I-30]

She stated, “We’ve done a lot of work with Hennepin County.” She said about 50 percent of contracts from Hennepin County are contracted directly through their “IT or facilities group” because they have “specific vendors or systems in mind, and they want to have control over [procurement].” She added, “They don’t want to leave it up to the bid process to decide that.” [#I-30]

**Others described barriers that made working with one or more of the participating entities challenging.** Examples included:

- When asked if he has had working relationships with any Minnesota agency, the African American president of a workforce trade organization responded that he had. He further expressed that the agencies “have no teeth” and are not coordinating with community agencies or organizations. [#TO-6]
- The white representative of a veteran-owned professional services firm faced the barrier of “[multiple] reviews has not gotten anywhere” with MnDOT. [#I-1]

He added “... the one challenge for me would be [not being given] an explanation on how to become qualified ... [instead, they kick] back the paperwork and [say], ‘You did not do it right. We need to see more information here.’ I guess if they were really interested in getting more qualified contractors on some sort of a list, they’d be more helpful in getting [the] paperwork [completed] and giving examples of what they need to see on the qualifications paperwork.” He commented that the bureaucracy of the application process is the main reason why he has not been able to bid on any MnDOT project directly. [#I-1]

- The white representative of a veteran-owned engineering firm, when asked how he finds out about MnDOT work, said that he could see the project list, and see which projects will come up for bid. However, he added that he cannot see the general contractors that are submitting until they have submitted their bids. He commented, “So, I am at the mercy of my marketing.” [#I-1]
- A white female representative of an SBE-certified majority-owned construction firm reported, “We have to show good faith efforts, that we tried across all avenues,” She said that she was “not a fan. We actually had gone through multiple review processes, on two occasions, cost us six months’ worth of work. We won ... our cases but lost in the end. You know, you send all of your employees home while you’re fighting for the work that you were low bid on ...” [#I-35]
- The African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm stated, “State of Minnesota ... two years ago they had a massive contract that came out, and they had what’s called the TGB Program .... We were never notified of that ... this particular solicitation was out ...” He continued, “The problem is all these agencies ... only broadcast on their own website. They don’t put it on the... construction exchanges that everyone would look on.” [#I-19]

He further commented, “In this particular disparity study I think there are nine agencies, but there are 20 agencies or 30 agencies out there ... they all have their different websites ....” He added, “If a company had to every day look at all 30 of the agencies, and then look under all the construction ... they’d have to have a full-time person ... the problem is they post ... jobs and they only post them in their own portals. They don’t post them in any public portals.” [#I-19]

## J. Insights Regarding Business Assistance Programs and Certification

Business owners and representatives reported whether they had taken advantage of or had any knowledge of any contract preference goals programs or any business assistance programs in Minnesota. Topics included:

- Price preference;
- Contract goals;
- Sheltered market (where bidding is restricted to certified firms);
- Prompt payment requirements;
- Business assistance (including financing, bonding and mentor-protégé, others); and
- Experience with certification and certifying entities.

**Price preference.** Business owners and other commented on awareness and application of price preference programs.

- The African American owner of a MBE-certified specialty contracting firm mentioned that he had taken advantage of price preferences in the past. He did however indicate that he was unaware of several other business assistance programs and commented that the State should do more to advertise such programs to small and minority-owned businesses. [#I-21]
- When asked for any insights into price preferences, a focus group participant from a public entity commented that her entity has a program of up to 6 percent for price preferences directly with the State. She described the “Directly Select Program” where, as long as a firm is certified they can be selected for sole source opportunities. [#FG-1]
- A focus group participant from a public entity reported that Hennepin County has recently started a program for any contracts up to \$100,000 where it is similar to “direct select.” He added that the County statute requires selection of at least two bids to qualify for the program. He further added that the bidders are chosen from the County’s bidders’ list and do not have to prequalify. [#FG-1]
- Another focus group participant from a public entity commented that “price preferences” worked in her entity because the firms are “prequalified.” She added, “We have seen a lot of contracts go off to small businesses ....” [#FG-1]

The same representative reported that her entity permits “self-certification” when a firm believes that they have met the requirements and that they sign an affidavit to attest to their qualifications. [#FG-1]

**Contract goals.** Some reported on contract goals programs. [e.g., #I-21, #I-53, #-I-65, PFP#25] Examples included:

- A Subcontinent Asian American owner of a professional services firm reported not being aware of goals and other programs and that this information was not available to him when he started his business. [#I-28]



- A white male representative of a minority female-owned engineering firm reported that having goals results in primes wanting to “meet goals; not exceed the goals.” [PFP#23]
- A Hispanic American representative of a Latino leadership organization, regarding contract goals, reported that awareness of set goals for hiring minority-owned businesses, although bigger firms he knew reported that there were not enough qualified applicants. [#TO-2]
- A white female owner of a TGB-, CERT-, and WBE-certified specialty contracting firm, when asked if contract preference goals benefited her firm, stated, “Yes. I think that more and more there [have] been opportunities and doors that have opened because of our certifications that wouldn’t have been an option before.” [#I-30]
- An African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm stated that if there were no goal requirements, prime contractors would only hire the firms they have the relationship with, which more often are non-minority- and non-female-owned. [#I-49]

**Prompt payment requirements.** Although many business owners reported issues with receiving prompt payment, few reported any knowledge of prompt payment requirements.

- When asked about recordkeeping on subcontracting or difficulties with it, a focus group participant from a public entity responded, “Usually the subs would call ....” He added that state law requires that after receiving payment, primes must pay their subcontractors within ten days. He explained that prompt payments to small businesses were important for business growth. [#FG-1]
- Another focus group participant from a public entity reported, “In my experience, prompt payment is a big issue ... whether retainage ... not getting paid ... payroll issues ... technology ... payroll software ....” [#FG-1]

When asked if the public entity used software where a prime enters payroll information, the same representative responded, “I do not think the City is ....” He added that the public entities usually pay the “most promptly ... there can be delays ... processing an invoice ... and that trickles down ... to subcontractors and second tier subcontractors ....” [#FG-1]

However, he added, “I don’t know how much enforcement we all provide ... that depends on agency as well.” [#FG-1]

**Business assistance (including financing, bonding and mentor-protégé, others).** Some business owners and representatives reported any awareness of business assistance programs.

**Financing.** One business owner had applied for financing, but failed. This white female owner of a specialty contracting firm stated that she needed financing for equipment. She indicated that she has been in contact with WomenVenture, but her credit score did not qualify for the assistance she needed. [#I-59]

Training, classes and seminars. Some reported having taken advantage of classes on bookkeeping and other subjects, for example:

- The white male executive director of a non-profit trade association, when asked what kind of education programs the organization offers, stated that they have programs related to finance, insurance, contracts, law and technology. [#TO-4A]
- An African American owner of a TGB-, CERT-, MBE-, SBE-, DBE-certified specialty service provider firm when asked about his knowledge business assistance programs responded, “I have taken advantage of these business assistance programs, and the Department of Transportation has a QuickBooks class that my people have taken, but yeah, we’ve taken advantage of those programs.” [#I-19]
- A white female owner of a WBE/DBE-certified specialty contracting firm reported that she participated in “a few” education classes by MnDOT. She went on to say that, the only class that was not helpful was a free, “basic” QuickBooks class; she indicated it was too basic. [#I-56]
- The Hispanic American part owner of a Hispanic American woman-owned professional services firm reported receiving 20 hours of free “valuable assistance” through the Metropolitan Economic Development Association (MEDA). [#I-5]
- A white male representative of an Hispanic American male-owned certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm noted that MnDOT has offered classes through the University of Minnesota covering topics ranging from accounting to construction management and with a partial degree-option from those programs. He indicated taking advantage of them and so has the office manager. He also reported Associated General Contractor educational programs free or discounted for members. [#I-18]
- The white male representative of a white women-owned specialty contracting firm reported that his firm offered training and tuition assistance for [specialty] trade programs to potential employees completing an accredited program. He explained, “If you enroll, I will pay half of the [tuition] cost upfront ... if you complete the course and pass, I will pay the back out .... Then we’re both vested.” He added, “That’s a model we’ve stuck with now for at least 10 years, and I believe we have a 100 percent success rate.” [#I-31]
- When asked about her knowledge or experience with business assistance programs, a white female owner of a TGB-, CERT- and WBE-certified specialty contracting firm reported that as a member of the Association of Women Contractors she received “a lot of education” since joining, and a six-week DBE contracting education program through MnDOT. [#I-30]

- A white male sole proprietor of a veteran-owned consulting firm indicated that he had an office at the Workforce Resource Center. He said, I don't think that many people understand the resources that are available to them .... The State of Minnesota has many resources for retraining .... The Workforce Resource Centers have good help in putting together a good résumé for applying for a job or contract ... [including] interest assessment and working with individuals to move into a career path with training.”  
[#I-4]

**Mentor- protégé programs.** A few business owners and others commented on mentor-protégé programs, for instance:

- Regarding mentor-protégé program a focus group participant from a public entity reported, “We have had some successes ... some not success ....” She commented that due to their successes, the entity always promotes the program. [#FG-1]
- A white male veteran with disabilities owning a certified specialty contracting firm reported awareness of a mentor-protégé program for new business owners in the industry by saying, “If somebody’s starting up ... they could get with another company that is established and ... take them under their wing and help them get educated ....”  
[#I-26]
- The white female owner of a TGB-, CERT- and WBE-certified specialty contracting firm reported participating in WomenVenture’s Scale Up! Twin Cities program, a year-long mentoring program. [#I-30]

**Capacity building as priority.** Some reported on capacity building measures successes and failures. Comments included:

- The focus group participant from a public entity reported, “We have a few businesses that are very successful ... they are growing ....” [#FG-1]

When asked the type of assistance given to growing firms, the same representative reported that the entity has resources to recommend to them such as the entity’s resource center and other marketing resources. [#FG-1]

- When asked if capacity building was a priority, another focus group participant from a public entity commented, “There were some [certified firms] ... who purposely wanted to stay low ...” She said, other firms “are scrambling to get to the top ....” [#FG-1]
- Although attempts, by public sector entities, are made to build capacity for small and disadvantaged firms, one focus group participant reported that there was a deficiency in outreach to second-tier subs from first-tier subs. This participant added that the “diversity gatekeeper” at each entity has no control over contracts awarded below the prime level. [#FG-3]

**Networking opportunities.** Interviewees reported their experiences with “meet and greets” and other networking events and outreach. For instance:

- The white male veteran owning a DBE-certified specialty services firm reported frustration with “meets and greets.” He indicated that he was trying to figure out how he can find work on his own [without a broker] and his friend told him to go to a “meet and greet” event to network; however, he found it unhelpful. He stated, “At the “meet and greet,” only one of the attendees had his actual name on the card that he handed out ... [They were] mostly generic cards of the company.” When he asked for direct contacts, he was told to “just call the office.” [#I-2]
- A focus group participant reported that “meet and greets are more for the agencies, than [businesses owners who attend them].” This participant added that when having attended “meet and greets” the response from primes was always, “Are you on a State contract? ... If you’re not on a State contract, we can’t use you.” [#FG-3]
- The white female attorney representing a chamber of commerce reported that the organization provides networking events to get members to get them out of their comfort zones and expand their networks. She added that those in the “good ol’ boy” network could help themselves by expanding their networks as well. [#TO-1]
- The male Hispanic American trade association representative added that apprentice-training centers provide outreach. [#TO-10B]
- The Subcontinent Asian American male representative of a Subcontinent Asian American male owned MBE-certified professional services firm reported, “I did participate in the National Minority Supplier Development Council that was held in Wisconsin; it is a “meet and greet” with the large companies to connect with us as suppliers.” [#I-54]

Some business representative reported no or limited experience with or knowledge of business assistance programs. For example:

- The Asian-Pacific American male representative of an immigrant business association reported no knowledge of any business assistance programs in Minnesota. [#TO-11]
- An African American female owner of a specialty services firm serving persons with disabilities reported that she had no knowledge of business assistance programs. She commented that she only knew how to register her firm with the State. [#I-55]

Efforts of MBE/WBEs to include other targeted businesses. Some of the representatives of minority- and women-owned firms said that they try to reach out to other targeted businesses.

- The white male representative of a white woman-owned DBE- WBE-certified specialty contracting firm stated, “The majority of contractors don’t fully understand how to use WOSB status to their advantage.” He added that when suppliers are working for prime contractors, the suppliers are not always aware that their contracting decisions can boost certified-business participation rates on an overall contract. He stated that his firm works for one supplier that recently has begun asking about certification, but that this is an exception, not the rule. [#I-46]
- A white female owner of a TGB/CERT, and WBE-certified specialty contracting firm reported there are three women-owned businesses in the Twin Cities area that her firm sometimes partners with. When asked if working with these women-owned businesses is a positive experience, she stated, “It is .... If the goals are the same for both companies to align on the project, it makes sense.” She added, “At the end of the day, I have to go with what makes the most sense to win the job and provide the best value to my customers .... I usually get multiple bids for projects, and if I can use one of my women-owned partners, I will. But, sometimes that’s not an option.” [#I-30]
- The Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm said that they keep track of who they are hiring. [#I-18A]
- When asked about his firm’s efforts to include targeted businesses, the African American male owner of a specialty services firm said, “My community mostly [is a] community of minorities, and .... most of those who ... are doing the temporary work for us are from the low-income [communities], and [include] minorities and women .... Those are the [contractors] we’re operating with.” He added that prime contractors want to “give back to the community” and “make everybody look good within the community.” [#I-20]
- The white female with disabilities who owns a professional services firm reported, “About 80 percent” of the people she has worked with and recommends to clients are women. However, she added, “I don’t necessarily know that they’ve been certified.” [#I-50]

She added that minority- and women-owned businesses might not be as successful without efforts by primes to hire them. She said, “I think it’s more difficult [for minority- and women-owned firms].” [#I-50]

- The Hispanic American male owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm noted that they do not specifically seek out DBEs or MBEs. He said that he has teamed with DBEs on the City of Minneapolis projects.

He added that he has not had problems identifying DBEs and that are not many in the Twin Cities that do related work and that he already knows most of them. With respect to choosing these companies, he said that if it were a new DBE, he would look at their website and perhaps takes them to coffee and let them show him their work before considering them. He noted that he finds out if they are a targeted business on the State of Minnesota website. [#I-67]

**Experiences with certification and certification agencies.** Business owners and representatives reported on being certified, thinking about becoming certified or becoming certified and on certification agencies.

**Knowledge of certification programs.** Business owners and representatives indicated their level of awareness of certification programs in Minnesota. Many of the interviewees were very knowledgeable, but others were not. Some of the interviewees who had relatively little knowledge were trade association representatives. The following comments provide examples:

- The white female attorney representing a chamber of commerce reported that she is aware that firm certification exists, but does not know what certification entails or how it benefits firms. [#TO-1]
  - The white male representative of a white women-owned specialty contracting firm when asked about targeted business programs said, “We just keep things so darned simple .... I could see if we were short on work or looking for more, but things just seem to click along, so we haven’t [considered applying]. I really do not know, and that is a good question. Maybe that is something we should [consider].” He added, “Maybe this is the conversation that spurs that initiative.” [#I-31]
  - The African American female owner of a professional services firm indicated that participating entities should better disseminate information regarding certification, as she said that she is unaware of the steps necessary to begin the process. [#I-71]
- She added, “I’m not certified, and if you tell me how to become certified, it’s something that I would love to do. Just for the exercise if nothing else.” [#I-71]
- The African American male owner of a specialty services firm thought certification was only for professional certification. “It depends on the profession, every profession has its own certification board ....” He added that certified firms need to renew their certification on either a one- or two-year basis. [#I-20]

Many more interviewees were aware of certification and were considering it or had been certified.

For some, getting certified was difficult, time-consuming, paper intensive or challenging in other ways. [e.g., #I-23, #I-39, #TO-5] Examples of comments include the following:

- A white female owner of a DBE-certified professional services firm commented that certification and recertification processes were time consuming and paperwork intensive. She added that it would be better if MnDOT and Saint Paul processes were coordinated. [PFP#25]
- An Asian American male owner of a CERT-certified services company commented that he recently went through the long tedious certification process and attended unproductive meetings. [PFP#27]
- The Hispanic American part owner of a Hispanic American woman-owned marketing firm reported that he did not “complete the applications for two programs...” He also said that he had difficulty accessing them and submitting documentation. [#I-5]
- The Native American female owner of a professional services firm said, “[DBE] certification is so hard. That one is so hard to get, and I feel it continues to perpetuate the marginalization, especially of women-owned businesses. It takes months and months ... to get that certification, and then you have to jump through so many hoops.” [#I-61]

She continued, “There was a great deal of paperwork .... I had to prove that I was running the business [and] that I was not a front for [my partner]. It all came down to that .... I recall just how hard it was, and I ... started the process and I am not even sure if I followed through to finish it, because I might have just closed my [construction] company down by then. But it took a long time to get the documentation submitted and ... everything notarized.” She added, “Then it would take up to a year for your certification to be approved after all your paperwork was in.” [#I-61]

She added that she would pursue DBE certification for her consulting firm in the near future. She said, “I should be doing [the certification process] again. I really think ... I blocked this whole opportunity out of my mind because of the stuff I went through. I’m going to have the courage and [pursue certification] again ....” [#I-61]

- The white female owner of a certified specialty contracting firm (CERT, SBE, WBE, DBE, MCUB) considered the certification process easy, except for MnDOT. She said, “I know that overall, MNDOT is much more difficult to work with than most of the other certifications. I know in our shop ... nobody likes working with MnDOT, but we do [it anyway].” She said this is because “there’s so much paperwork” and “so many different requirements.” [#I-44]

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) stated, “It was a little ridiculous, [some of] the actual certification process ....” She went on to say, “One quote from one of the questions is, ‘Provide evidence of gender’ .... They were asking for birth certificate, that is really what it boiled down to .... It was just a ridiculous question. I brought my birth certificate in half a dozen times for these different certifications.” She went on to say the certification process sometimes feels “a little invasive.” She continued, “At the same time, they want to make sure I’m not a figurehead and that I am who I am.” [#I-45]

She indicated the certification process is too difficult for smaller, less capable firms. She said, “I think it would be extremely difficult if I was not part of a company that had the infrastructure to handle it. I think it would have been a significant amount of paperwork to try and do that and also run a company.” She said it took one of her employees several weeks to gather all the required information. She commented, “If I had had to do that, then I would have been missing out on sales or [other work] .... It’s a cumbersome process.” [#I-45]

- The Hispanic American male owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm reported that the processes are time consuming and repetitive. He added that for recertification, financial data already exists and should not be required to duplicate it. [#I-67]
- The African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm reported that the certification process with some of the entities was “long and tedious,” but it is a “pretty fair process ....” [#I-22]
- The Subcontinent Asian American male representative of an 8(a), WBE-, MBE-CERT certified professional services firm reported that the process of getting certified is complex because everything has to be transparency including tax papers. [#I-42]
- The white male person with disabilities owning a TGB/CERT-certified specialty contracting firm reported that he has tried to gain DBE certification a few times. He said, “It’s a joke...I’ve had it with the whole system.” [#I-12]
- The white male owner of a SDVOSB-certified specialty contracting firm stated when initially starting the federal certification process they had to enter their information in five different websites. He said, “The SBA and the VA won’t allow you to start attempting to get certified until you go through two other websites, I believe .... That process through the federal government took about six months.” He added that the renewal process would probably take about one week sending information and documentation back and forth until the requirements are satisfied. [#I-6]



- The white representative of a veteran-owned engineering firm reported that certification is not an easy process, and that there is a lot of paperwork involved. He said, "There is a lot of information they demand from you as a company, and personally, that you need to somehow collect and organize and redistribute .... You have to upload everything in certain categories on their website, and you have to do it correctly, and there's a review process .... They tell you if you got all the forms, and what additional paperwork they need to see .... You have to do that every two years." [#I-1]

He added that it took him about 80 hours to complete the certification process for the first time. It took him around 20 hours the second time, because all he had to do was update some of the company information and upload some of the new required paperwork. He commented that it is not a guarantee that a company will be accepted every two years. [#I-1]

- The white male owner of a supply firm indicated he did have problems with classification as having dyslexia. He explained that he never received any indication that he was not on the [disabilities] list after three years and was not aware that he had to reapply. He stated it was about 10 years before he realized they were not on the list. [#I-8]

He further commented that he only found out about not being on the list when there was a change in staffing at the State. "So, all of a sudden they get a new staff person in there ... who says 'Ok we have to have this renewed every three years.' Well, we did not get that. And so, we went along ... for about 10 years not even knowing that we were not on that list anymore ...." He commented that it is difficult to stay up to date with the State requirements. [#I-8]

- Regarding certification, the white male person with disabilities owning an SBE-certified professional services firm reported that he tried to become certified with Met Council years ago, and that they accused him of being "a liar." He further added, "[Met Council] really treated me bad." [#I-10]
- The white female with disabilities owning a professional services firm reported, "It's pretty easy, but it's annoying to have to recertify every year .... Right now, I don't even know if I'm [still] certified or not." [#I-50]

When asked about the advantages or disadvantages of certification, she said, "I think it gets you ... on certain lists, but I've never gotten a job because I was on that list." She went on to say, "I think that the Department of Administration's list works for all of the State of Minnesota, and then I'm also on the University of Minnesota's list." [#I-50]

When asked for any recommendations to improve the certification process, the same business owner said that she does not think it needs to be an annual process requiring recertification every year. [#I-50]

- The Hispanic American male owner of a professional services firm said he is pursuing the MBE certification, but that finding the application site was confusing and the link for Minnesota was not working. He noted that he does not know of other certification programs with the State and he said he thinks it is difficult to become certified. He noted that the application is “very long and complicated” and that they ask for “so much information [that] it just seems unrealistic.” He added that he is not sure what having to provide bank statements has to do with minority status. [#I-68]
- A focus group participant from a public entity commented that some certification programs “are confusing ... different requirements and different applications ... different standards ....” [#FG-1]

She added, “It [certification] is quite difficult, across the board ... and frustrating when you go through the process ... certify yourself or learn about the various processes ....” She added that some business owners ultimately do not see contracts after being certified. [#FG-1]

The same focus group participant, when asked how often entities hear that a firm is certified, but actually is not, said, “A lot ... because the certifications are similar, but different ... they do not understand that it is a separate process ... I hear it every day.” [#FG-1]]

- When asked if certification applicants “walk away” from the process if too much personal information is required, responded, “Yes ... I have seen people say, ‘I just cannot give up that information’ ... so that’s a problem ....” [#FG-1]
- The white female owner of a [closed] DBE-, TGB-certified specialty contracting firm reported, “... I was a DBE or a TGB ... they would just call me up to get my bid on this project just so they could tell the State, ‘I got a bid ... and then they would go to their buddy and use them anyway. I even got solicitations for bids on projects that had no electrical on them. They knew I was an electrical contractor...I would send the bid back and say that there wasn’t any electrical on the project...I think they were just trying to fulfill their [good faith] requirement.” [#I-65]

For others, certification protocols were not difficult. For instance:

- The African American owner of a TGB- CERT-certified specialty contracting firm reported that it was not difficult for him to become certified. He said that he just had to get his information together and submit it, and that he has to recertify every couple of years. He went on to say that, the certification process is straightforward. [#I-13]
- The African American president of a non-profit minority trade association when asked if the certification process was easy stated that he thought it was and that the certification process is completed online. He commented that he thought it was helpful to the owner to become familiar with bylaws and having financials in order, for example. He added, “If you’re not having regular financials, that’s not a recipe for success.” [#TO-9]

- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm noted that the certification process was easy, but what is happening is that recertification can take months. [#I-43]
- The white female owner of a certified specialty contracting firm (CERT, SBE, WBE, DBE, MCUB) said, “I would say it’s fairly easy.” She added, “Once you get certified ... you just have to [renew]. Obviously, the very first time there is a lot of information to fill out and ... provide. However, in the scheme of things, [for] how valuable that is, I think it is easy. It might take a week of gathering all the data and getting all the paperwork filled in ... but once you do that and you’re certified, then ... you [just] have to [maintain it]. [#I-44]

A large number of business owners and representatives reported certification as advantageous. Comments included:

- The white representative of a veteran-owned engineering firm reported that the federal certification is his only advantage; he has not taken advantage of other programs and certifications. He indicated, however, that he is aware of the other certifications [#I-1]
- The white male sole proprietor of a veteran-owned consulting firm said, “Any kind of certification that you qualify for...one should go out and get. That is the very basic... should not be overlooked in competing. Look at them and obtain those that apply.” He added that the certification process “was quite straightforward...” [#I-4]

He further commented that if an applicant faces difficulties with certification, he should “... [Be] determined and not quit...bull dogging it if you will...don’t give up – they bring new things to the table. Add experience...whatever you can to your resume with real certification, education, taking advantage of them and putting them on your resume.”[#I-4]

- The Asian-Pacific American male representative of an immigrant business association reported, “I don’t think that they’ve had problems yet. But, they need to know that they need to be registered to get certified.” He said that the organization has reached out to City of St. Paul and North Central regarding certification information. He said that certification with City of St. Paul is “helpful and easy.” [#TO-11]

When asked about the advantages of certification, the same representative indicated that certified businesses have more marketplace visibility than firms not certified. [#TO-11]

- Regarding knowledge of certification programs, the white female Executive Director of a non-profit women’s organization reported that the organization does not have a lot of clients that are certified. She stated, “If we believe that certification will benefit them, we [try to send them in the right direction]. We can’t control whether or not they get certified...” [#TO-3]

- The African American male owner of a MBE-certified specialty contracting firm said that becoming certified was, “Somewhat easy,” but was concerned that women and minority-owned businesses face different enough conditions in the industry to warrant separate certifications. [#I-21]
- The African American male owner of a CERT/TGB-certified specialty contracting firm was aware of two programs, “...The state of Minnesota has a program with VOP; it is not too much impact amongst the minority companies. The City of St. Paul has a Vendor Outreach Program... a vendor managed program for a list of minority contractors certified to work with the city.” [#I-40]
- Regarding her experience recertifying as a DBE, a white female owner of a DBE-WBE-certified specialty contracting firm said, “That was a good process ....” [#I-56]

The same business owner said that recertification “...made me look at my business a little bit more and ... tighten things up a little bit more. There were some things I hadn’t thought of, about growth and ... those types of things.” She said the people she dealt with were “very knowledgeable,” and commented, “I know I can make a phone call and get an answer.” [#I-56]

- The white female owner of a certified (DBE, WBE, TGB, CERT) professional services firm reported that her certifications are a key to her success; however, “To be honest with you, I did not even know what each of these different certifications were going to do for me.” [#I-47]
- An African American owner of a MBE-certified specialty contracting firm stated, “If you’re a small business and you’re not certified ... when the job comes up, you won’t know about it.” [#I-21]
- An African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm stated that his firm has “every certification known to man.” He added, “It’s easy to get certified. Everybody wants you to have that certification. They are more than accommodating. You just go do it. I have all of them ... For me not to have all of my certifications, I would not have opportunity ... Any business that does not get every certification available to them is leaving opportunity by the side of the road. It’s like taking opportunity and throwing it in the trash can.” The DBE certification is the longest process, but the others are fairly simple. [#I-49]
- The white female owner of a certified (WBE, SBE, DBE, CERT, MNUCP) specialty contracting firm said that her firm’s qualifications have been its biggest advantage. She reported that her firm is both American Institute of Steel Construction-approved and MNDOT-approved. [#I-44]

She added, “Keeping up all the certifications helps tremendously because ... when they [want] targeted business involved, that definitely is to our advantage.” [#I-44]

- The white male person with disabilities owning a TGB/CERT-certified specialty contracting firm commented that certification opens doors to work. He said that he could employ more people with more work if he could certify as a DBE. [#I-12]
- The white male representative of a Hispanic American male owned certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm reported that certification “is good” and recertification “is easy.” [#I-18A]
- The African American owner of a TGB- CERT-certified specialty contracting firm, when asked about advantages or disadvantages of certification, reported that being on a list of firms for programs such as the Target Market Program is helpful. Referring to the project that he received through the Program, he stated, “It was a nice advantage .... I never would have known about the opportunity.” [#I-13]
- The owner of a WBE-certified supply firm said, “My certification is very important to me .... It’s really hard to get that status; I mean you have to be a woman-owned business and actually running your business....” [#I-25]
- The African American female owning a MBE-, SBE- and WBE-certified professional services firm commented on the pros and cons of certification. She said, “You’re listed in the registry, so when public projects come up and they want to know if you have a certification, I would say that’s probably the biggest benefit. Does that get me work? I would say no.” [#I-17]
- The African American partial owner of an African American woman-owned certified (TGB, CERT, MCUB, MBE, SBE, WBE) professional services said, “... success is because you’ve earned it, not because you’re a special category or an exception basis. MBEs – we subscribe to all of the certifications. Getting in the door is half the battle, staying in the door is the other half. Until we no longer need the special help ....” [#I-38]
- The Hispanic American male owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm said he thinks these give him an advantage. He also reported they have received more State work because of their minority status than their DBE status. He said they get calls from architects they have never worked with before because they are looking to team up with a targeted business. [#I-67]
- The white female owner of a certified (DBE, WBE, TGB, MCUB, SUBP) specialty contracting firm noted that she has been a certified woman-owned business for a year and that it seems to be “kicking in” with the primes — they know they have to make the goal. [#I-23]

Others reported disadvantages or a “stigma” from certification. For instance:

- A white male owner of a VO-certified specialty contracting firm reported frustration where he had been contacted multiple times due to his certification, noting however that he was contacted about types of concrete work which his firm does not practice. [#I-9]
- A focus group participant representing a public entity reported that she has heard from firms that they do not want certification due to a stigma. The stigma, she reported, is “looking for a hand-out ... I can do it myself ... I do not need help ....” [#FG-1]

She added regarding stigma to certification, said, “Disadvantaged ... it sounds terrible ....” [#FG-1]

In addition, she remarked that she knows of certified firms that have no work. She said that she asks them, “Have you bid on anything?” She said that the firms expect procurement “to reach out to me.” [#FG-1]

- A focus group participant representing a public entity said, “I feel that there is a “program fatigue.”” He added that he does not think that existing programs “are working.” [#FG-1]
- The white female co-owner of a WBE-certified goods firm was critical of the certification system, reporting that it was not necessarily effective at promoting utilization of the businesses it was supposed to help. She indicated, “We haven’t actively pursued it because... even though there’s rules and ‘you should have this percentage,’ it doesn’t really happen and there’s ways to get around it, and we just think, ‘If we can compete commercially, our efforts are better spent ... commercially.’” [#I-27A]

Another white female co-owner of the same firm also condemned the system as ineffective and corrupt. She said, “[We] have been made aware of some opportunities from time to time, we’ve sometimes been asked to partner with other companies that want to do this, but our feeling about what we have seen thus far is that there’s much about this process that lacks integrity, and we don’t want to be involved in it.” [#I-27]

- The white female owner of a DBE-, SBE-, WBE-, TGB- certified professional services firm stated, “... there are times when I think we’ve handicapped ourselves by putting ourselves in that position.” She added regarding the DBE program, “The point of the DBE program is to get out of the program.” [#I-48]
- The white male veteran with disabilities owning a professional services firm reported, “There’s no advantage to it ... it’s not bringing business to my door. It is something that we can use to market .... There aren’t advantages.” [#I-7]

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm indicated that the benefit of DBE programs to minority contractors is diluted. He reported, “The problem is there are programs that... have targeted group business...start out as minority contractors but then they add women and anybody, and then they add small business and then pretty soon it’s 100% of the pool... so it’s not a preference program anymore.” [#I-19]

The same business owner added, “I’ve certified pretty easily,” but also that, “DBE certification should be harder to get .... I’m SBA98(a) certified and they go through everything with a fine-tooth comb. I think it gets rid of all the white woman contractors that say they’re contractors ... and even folks who say they’re minority contractors.” He further commented, “I think it needs to be ... a stronger certification.” [#I-19]

- The white woman partial owner of a DBE-, WBE- TGB-certified professional services firm reported using the DBE and WBE certifications has always been “a frustration and a barrier.” She added, “All they want from us is to sign the certification as part of the RFP...we send it to them, [but] they never ask for any numbers or any bids or tell us what our role on that project would be.” [#I-32]
- The white women owner of a DBE-, WBE- TGB-certified professional services firm agreed that certifications cause barriers and added that all that is wanted is her resume and then they never hear again. [#I-32A]
- When asked if certification is advantageous to the firm, a white female representative of an SBE-certified majority-owned construction firm indicated, “No, we have no advantage.... City of St. Paul doesn’t give advantage to SBEs, only the MBEs and the Veterans.” [#I-35]

Recruiting, delivery of services and education of firms participating in certification programs. A number of focus group participants reported on challenges reaching out to businesses and delivering programs. Examples of comments follow.

- When asked if public entities recruit firm to participate in certification programs, a focus group participant from a public agency said, “If we had more money and time ... we could do a lot more [recruiting].” [#FG-1]
- A focus group participant from a public agency said regarding outreach, “We do our best ... a lot of program areas to cover, it is difficult ... things take precedence.” [#FG-1]
- Regarding delivery of services, a focus group participant from a public entity said, “... it can cause confusion ... we have vendors who are confused ... one program has certain requirements and the next program does not ....” She added that as far as the contractor thinks, they are working with an entity; however, the entity does not streamline enough to help the small businesses. [#FG-1]

- A focus group participant from a public entity remarked that confusion exists for small firms with multiple certification programs. She commented that they do not understand “the race and gender” aspect to differing certifications. [#FG-1]
- A focus group participant from a public entity reported, “There is training going on all the time ....” She added that much of the training is “about how to get certified.” She said they plan to offer an outreach program, “... Now you are certified, now what?” [#FG-1]
- A focus group participant commented that in order for minority-owned or small firms to have opportunities, public entities and non-profit organizations should create mechanisms to assist the firms to compete in the marketplace. [#FG-4]

He added that firms need coaching through the RFP process so their proposals are at a standard needed to compete. [#FG-4]

Some interviewees made recommendations regarding coordinated certification among any or all of the certification agencies in Minnesota. Comments included:

- The white female Executive Director of a non-profit women’s organization, based on input from her clients said, “You really could spend all your time on [the participating entities’] application processes. So really, this aggregation in working in one portal where all of the entities agree on the data points, and there is a single application process [would be a good idea]. ...” [#TO-3]
  - Regarding the procurement and certification process, a white female owner of a TGB/CERT, and WBE-certified specialty contracting firm stated, “It’s a lot of paperwork, and quite honestly, we’re doing [it] for all of these different entities that don’t necessarily talk to each other, and then we’re also doing it for corporate .... It is a lot of work.” [#I-30]
- She went on to say it’s difficult to keep each entity updated in regards to certificates, financials and other information, and that “it would be nice if there was a uniform system across the board that ... took into account basic information [to] spread out to [each entity].” [#I-30]
- The white female Executive Director of a non-profit women’s organization, based on input from her clients said, “You really could spend all your time on [the participating entities’] application processes. So really, this aggregation in working in one portal where all of the entities agree on the data points, and there is a single application process [would be a good idea]. ...” [#TO-3]
  - The white male owner of a VO- SBE-certified specialty services firm recommended, “Well it would be very nice ... if all of these agencies had one uniform method of submitting for certifications .... It would be nice if they were all connected.” [#I-11]



- The white male veteran owner of a DBE-certified specialty services firm reported, “I think they need to look at all the DBEs that are in effect, and start weeding out the ones that should not be DBEs anymore.” [#I-2]
- A focus group participant from a public entity when asked if there is a chance that Minnesota entities would ever cross-certify, replied that the Governor has considered it for the future for some certifications, not all. [#FG-1]
- A focus group participant from a public entity reported that once programs are allowed to cross certify, there would be a process for targeting those firms, such as outreach on opportunities. She added that it is confusing for targeted firms now because they do not know when they should expect contact for opportunities. [#FG-1]
- When asked if it is possible for public entities to uniform their varying forms, a focus group participant representing a public entity replied, “It is possible ... sometimes personalities ... certain issues at certain entities ... get in the way.” She added that there is potential for entities to use some of the same forms. [#FG-1]
- A focus group participant from a public entity reported that there is not much cross communication between entities in Minnesota. He added, however, that a “one stop” portal where applicants enter information for differing certifications is a possibility. [#FG-1]

He added that personal information is sensitive and some business owners do not want to provide too much information. He said that on the portal, the business owner could limit the amount of personal information entered for certification processes and learn which certifications for which they qualify. [#FG-1]

- A focus group participant from a public entity commented, regarding forms, that the entities have been working for twenty years to consolidate the certification process. [#FG-1]

#### Other comments.

- The white male owner of a goods and services firm said, “I do feel if [certified firms] have an advantage over us [then] we’re at a disadvantage.” When asked if he has recommendations, he replied, “Get rid of [certifications and] quit labeling people. Business is business.” [#I-69]

## **K. Any Other Insights and Recommendations for the Participating Entities**

Interviewees reported recommendations specific to improving contracting practices among the participating entities.

### **Some business owners and business representatives commented on what the participating entities are doing well in their minority- and women-owned business practices specifically.**

There were a broad range of comments on participating entity efforts to make it easier for targeted businesses or other small business to obtain work with these agencies. For example:

- The white male veteran with disabilities owning a professional services firm, regarding bidding on RFPs, said, “The state has something called “quick quoting,” for example, MnDOT uses “quick quoting” ... ‘quick, it’s fast. It’s easy for projects valued at less than \$50,000.” [#I-7]
- The white female owner of a certified (DBE, WBE, TGB, MCUB, SUBP) specialty contracting firm said that MnDOT put goals on projects and sometimes they follow up and talk to them about primes meeting the goal. She suggested that, in order to improve, MnDOT should offer working capital as in past. She also said that they should offer more outreach to people outside the metro area. As it is, she said, they have to do the payroll at night and have no one there to go to for help with their questions. [#I-23]
- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT/TGB-certified professional services firm had positive comments about the communications about bid opportunities and business assistance that goes out from participating entities, “I know they have specific communications that go out to them, keeping them up to date on what’s going on.” [#I-52]

He continued, “[They have] education programs that they’re offering. Sometimes they have [events] once a year where you can go and meet all the different contracting people from the different agencies.” He went on to say, “Little things like that, I think are really helpful.” [#I-52]

- The white female owner of a certified (DBE, WBE, TGB, CERT) professional services firm stated that she has worked for the City of Minneapolis. She said, “It was really easy for me to navigate through the contract process.” She added that City staff was helpful to her as well. [#I-47]
- The Hispanic American male owner of a certified (TGB, CERT, MBE, SBE, DBE, MCUB, SUBP) specialty contracting firm recommended that noted that he wishes what the Governor has done with respect to advantages for businesses will be done with cities, counties, school systems, and even with federal government. [#I-18A]
- The African American president of a non-profit minority trade association stated that the “recent actions of outreach and awareness” are significant and he would like to see more of that. [#TO-9]

- An African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm although largely disappointed with the public entities, reported being happy with Hennepin County's prompt payment efforts, calling them, "the leader of the clubhouse," and saying, "if every other entity did it like that then ... that would help... some of the minority businesses." He added, "Hennepin County ... looks at their program and they ... find ways to add minority participation." [#I-19]
- Except for payment issues with Met Council, the white male veteran with disabilities owning a certified specialty contracting firm said, "I've had great experiences ... with all the agencies I've dealt with." [#I-26]
- A white female owner of a WBE/DBE-certified specialty contracting firm said, "I think the certification process is run very well. It is just that prevailing wage stuff [that's] ridiculous. That would be the only thing ... I have issue with." [#I-56]
- The white owner of a WBE-certified supply firm praised the University of Minnesota's mentor-protégé program, "They reached out to me and they said, 'Hey... you've helped out in the past... we'd really like to see this is our objective, can you help us with this? We're a great customer of yours ....'" [#I-25]
- A white male person with disabilities owning an SBE-certified professional services firm stated that the outer cities have better results than St. Paul and Minneapolis when it comes to helping small businesses and minority contractors. He reported that this is because outer cities don't have the "politics" that inner cities have; outer cities already accommodate small businesses in their cities because they want to keep them in their cities. [#I-10]
- The African American owner of a TGB- CERT-certified specialty contracting firm stated that the only participating entity that has directly benefited his firm and industry is the City of Minneapolis via their Target Market Program. He said, "They contacted us directly, which was great." [#I-13]
- The African American male owner of a MBE-certified specialty contracting firm said, "I think they doing a good job," He added, "They're always emailing and letting us know when they having something coming up." [#I-21]
- Regarding what public entities are doing well, the white male representative of a white women-owned specialty contracting firm indicated he has no issues finding contract opportunities with State of Minnesota. He also indicated they pay his firm in a timely manner. [#I-31]
- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm noted that large contracts could be broken into smaller pieces so that capable small firms can perform those portions. He indicated that Civil Rights and MnDOT are trying to have a set-aside for smaller minority-owned firms. He said this could be beneficial and that something else that could be beneficial could be the staff augmentation program. [#I-43]

- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) said the compliance reporting requirements for State of Minnesota are less cumbersome and less intensive than those for City of St. Paul and Minneapolis. She added that Minnesota State does well to incorporate consideration of qualifications and competence in their bidding process rather than favoring only low bid. [#I-45]
- The white male representative of a Hispanic American owned MBE-, DBE, SBE-DBE, MCUB-, SUBP- TGB-, CERT-certified professional services firm reported that Met Council has done outreach DBE “meet and greets” and training. He said it would be helpful if all public entities participated. [#I-29]
- The African American male owner of a (MBE, SBE, TGB, DBE, SBE, CERT) specialty contracting firm reported that Met Council and City of Minneapolis do a good job of giving certified firms access to opportunities. [#I-63]
- A white female owner of a WBE-, DBE-, SBE-CERT-, TGB-certified professional services firm reported that the training programs offered by MNDOT and Met Council are helpful. She said that their classes, seminars and workshops are, “... just fantastic at helping to understand the business side of things.” [#I-53]
- The white female owner of a CERT-certified specialty services firm commented, “...they could take a lot from St. Paul’s bidding process and their RFP [website St. Paul does a great job...more [entities] across the board [did the same] ...would make it a lot easier for small businesses like us to find work.” [#I-64]
- An African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm reported, “The City of Minneapolis, I think, is doing the best. MnDOT is doing the worst, and everyone else falls in between ... MnDOT spends much more than anybody else, and their DBE numbers are still paltry.” [#I-49]

**Some business owners and business representatives commented on what the participating entities are not doing well in their minority- and women-owned business practices specifically.**

For example:

- The African American male owner of a specialty services firm, when asked what the participating entities are doing well, stated, “I’m not sure, because from what I read in newspapers ... they are not doing well with minorities [and] women ....” [#I-20]
- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm noted that no one is meeting their goals in Minnesota as they are about 50 percent short and things are even worse outside of the metro area. He commented that there is plenty of work for minority-owned businesses and that there should be more. He said that there would be more opportunities for DBEs and minority-owned firms if the agencies would enforce the requirements. [#I-43]

- The white male representative of a white woman-owned DBE- WBE-certified specialty contracting firm commented that most of the certified business utilization goals are “used up on dirt work, dirt hauling and hauling aggregates, and then very little of the DBE utilization gets spread out to [other specialties].” [#I-46]

**Some reported on programs or practices they would like to see, improved or retired.** Examples are provided below.

A number of public forum participants commented that there is a need for improved outreach and dissemination of information regarding minority- and women-owned businesses and veteran-owned businesses. For example:

- An African American owner of an MBE-certified specialty-contracting firm remarked that a list of minority buyers would be beneficial to small firms, because he has difficulties locating minority firms. To save time and money in the process, he added that his firm could reach out to other minority firms if a comprehensive list existed. [PFP#20]
- An African American female owner of a MBE/WBE-certified professional services firm commented that it is difficult for certified firms to get information from public entities on public procurement opportunities. [PFP#24]
- An Asian American male owner of a CERT-certified services company commented that there is limited flow of information from the certification program once a firm is certified. [PFP#27]
- A male representative of a veteran-owned business group commented that his group had previously requested Minnesota have a public forum for veterans’ groups. He added that he appreciated that MnDOT developed a state certification program for veterans and there is a need now to reach out to veteran-owned firms to apply for certification. He commented that as certified veteran business owners are retiring, younger veterans are not replacing them. [PFP#1]
- A white female owner of a DBE-certified professional services firm commented that she and her colleagues have had not success with any “meet and greets” and considered them “obligatory by the generals.” She added that some “meet and greets” cost money to attend and take a lot of time from her day. [PFP#25]

A number of business owners reported on unbundling of contracts. Unbundling of contracts was mentioned as part of some of the previous comments in this appendix. Additional comments follow:

- A white female representative of a majority-owned general contracting firm commented that large firms have opportunities to unbundle contracts that would expand opportunities for small firms. [PFP#11]

- An African American male representative of a DBE-certified, white woman-owned professional services firm explained that engineering and architecture firms establish the framework of a project via the construction documents. He added that how the project is broken down to support small businesses is not included in the construction plan, reporting that unbundling begins with A&E. [PFP#2]
- When asked if unbundling of projects is a good idea, a focus group participant from a public entity reported that his entity provides “pool” opportunities for available firms, however, they do not “unbundle” projects. [#FG-1]

He added that the experience gained by smaller firms adds to their capacity to perform larger projects. [#FG-1]

- An African American male co-owner of a MBE-certified goods and services firm indicated that it is a challenge for his firm to pursue certain large contracts because they don’t have the capacity to perform all of the work themselves; he indicated that it would be helpful if some of these contracts were unbundled. [#I-62]
- The African American female owner of a specialty services firm stated that it would be helpful if public entities unbundled large projects more often and made a portion available to smaller firms like hers. [#I-24]
- An African American male owner of a certified (MBE, DBE, SBE, TGB, CERT) specialty contracting firm indicated that minority- and woman-owned businesses would benefit from contract unbundling. He said, “I would like to see all of those entities unbundle contracts. [#I-49]

**Other ways to improve practices.** Comments included a broad range of ideas.

- The African American representative of a workforce trade organization said that desired results are not achieved. He said “the horizontal world [horizontal construction industry] is not accountable.” “There will be a day when that industry will be punished ....” [#TO-6]
- The white representative of a veteran-owned engineering firm suggested assigning a case manager to one or a few companies that are trying to break into that type of work would be a great idea rather than just letting these companies flail and try to figure it out for themselves. He explained, “If they could have representation, that aids companies, get qualified and get the proper information to the right people, so that the process moves on a little bit quicker .... I’ve been working on this for about two years now, and I haven’t gotten any closer to being qualified to work as a primary contractor then I was when I first started the application process.” [#I-1]

He added that making the application process easier would widen the pool of contractors available to MnDOT; it would also help smaller and medium-sized companies to break into the industry. [#I-1]

- The African American male owner of a CERT/TGB-certified specialty contracting firm commented, “I would encourage and advise that the State (and other entities) for minority workers, to add... a program for minority contractors to get into the construction industry with training support, financial understanding, and getting work ....” [#I-40]
- The white male owner of a supply firm suggested that the State have boards and include small business and persons with disabilities on those advisory boards. [#I-8]
- The white owner of a WBE-certified supply firm commented that the main flaw of current programs and policies is to be a general lack of organization. She indicated that the system would drastically improve “If the agencies just had a program and... if you were awarded the contract... everyone just had similar standards and bought from you.” She also expressed that she wished “They buy through your website,” as opposed to ordering through a variety of other mediums. [#I-25]

She added, “If you can streamline that procurement process, the more you can streamline it the easier it’s ‘gonna’ make for people. If it is so complicated, I mean it just takes resources to navigate through all that. So, the more simplified of a process, it does help small business.” [#I-25]

- The white male representative of a trade association reported that he would like to share with the Department of Administration or MnDOT that there is a need to understand that the changes in technology affects participation in the industry for workers in the industries. He said, “The technology makes us more efficient, but it’s limiting our opportunities. I don’t believe people are taking that into account.” [#TO-10A]

He added, “I was in [the] industry for 40 years when they were drawing by hand; today men and woman ... are working on an iPad that shows the cost change in one day. [#TO-10A]

In addition, the Hispanic American male representative of a trade association commented, “... on the design side; it is possible to coordinate between the crafts using technology. What would have stopped a job to have a meeting and then make changes would have taken more time. Today, it is more time in installing than in planning.” [#TO-B]

- The white male veteran with disabilities owning a professional services firm reported that when counties or state send out the RFQ details, “it was too time-consuming to submit a bid with supporting documentation, it’s not worth it ... we decided not to do it. We’ve been invited to participate in a couple of bids that aren’t worth it. The folks didn’t know what they wanted. It was a waste of our time. We choose not to do business with them.” [#I-7]

He added, “I would love to be hired by the State to help fix the process; I’m not going to provide insights on how to improve the process ... why would I help my competition. Why should I help the state fix it? There are other things that I’d like to see to make it easier. I want my competitors to go through all the crap I had to go through.” [#I-7]

- A white male person with disabilities owning an SBE-certified professional services firm stated that what this study is doing is important, but it has to be taken to the next step. He said, “the next step” means getting minority contractors involved and teaching them how to do the work. He went on to say that minority contractors cannot be allowed to fail on projects. They should be helped, he added; otherwise they will never see repeat business. [#I-10]
- The Asian-Pacific American male representative of an immigrant business association commented that the participating agencies should engage small businesses more, and that lack of resources and timely information has been an issue for the organization’s members. [#TO-11]
- The Native American male representative of a non-profit minority education and training association commented on the current reform efforts, saying, “What’s unfortunate is that the public education system and [Minnesota State] in particular are really driving this conversation and they don’t understand that they are dinosaurs from a bygone era ....” He added, “... they are really hesitant to relinquish their dominance in this conversation because there’s so much money involved, so much tuition dollars and ... government subsidies that are at stake that ... could potentially be an existential threat to these institutions. And so, I don’t think that we’ll see meaningful change until they’re put in their place and kind of really told to sit down.” [#TO-8]
- The African American owner of a TGB- CERT-certified specialty contracting firm reported that he would like to see more inclusion in bidding opportunities and opportunities should be brought to the attention of smaller companies. He commented, “You can’t do the work if you don’t know about it. You can’t bid on something that you’re not aware of.” [#I-13]



- Offering suggestions, an African American owner of a TGB, CERT, MBE-, SBE-, DBE-certified specialty service provider firm focused on strengthening the DBE program to help minorities. He suggested, “The participating entities should ... look at their ... pool of minority contractors ... and what certifications they have and have stronger certifications, and make sure that those contractors are really contractors.” [#I-19]

He also noted that more variety in minority contractors should be utilized, recommending, “They should look within their scopes of work. If the same minority contractor’s participating on 90 percent of their projects, then they should find ways to give other minority contractors an opportunity to participate.” [#I-19]

- The African American male owner of a MBE-certified specialty contracting firm had said regarding small and minority-owned businesses, “When you’re doing extra work, make sure you get a change order cause a lot of times if you don’t have a change order in the office they don’t know you done the extra work.” [#I-21]
- Regarding what public entities could improve, the white male representative of a white women-owned specialty contracting firm indicated that the procurement process could be more streamlined, with less paperwork. He said some of the required paperwork is “too much” for smaller firms to handle by themselves. [#I-31]
- The Subcontinent Asian American male representative of a Subcontinent Asian American male owned MBE-certified professional services firm commented, “... if we can get better platforms to showcase our capabilities. I know the government agencies are working hard to motivate and support the small firms, women owned firms, minority owned firms. It would be helpful to have a percentage set aside. It would be great to have more opportunities to do business with them. We would like to have more information about opportunities and be alerted to those opportunities.” [#I-54]
- The African American male owner of a (MBE, SBE, TGB, DBE, SBE, CERT) specialty contracting firm commented that conversations like this study are a good way to make improvements in processes. [#I-63]

**Some made additional comments regarding programs for small businesses, veteran-owned businesses and businesses owned by persons with disabilities.** Comments included:

- The white male owner of a SDVOSB-certified specialty contracting firm commented that the State of Minnesota is doing well regarding veteran-owned businesses. He indicated there should be more projects with goals. [#I-6]

- The white male owner of a VO- SBE-certified specialty services firm recommended that entities other than MNDOT, “Put veteran goals on a project. Veteran business goals and veteran workforce goals.” [#I-11]

He added, “... it would be very nice ... if all of these agencies had one uniform method of submitting for certifications .... It would be nice if they were all connected.” “It would be nice if they had a list of approved subcontractors. “It’d be nice if there was a database for general contractors ...this is the type of vendor or sub I’m looking for ... this is the type of goal I need to fulfil.” [#I-11]

- The African American male owner of a specialty services firm stated, “All of them [should be improved.]” He went on to say, “The size of minorities in those programs is still very, very, very small. So, [the state needs] to encourage them to [pursue the programs].” When asked if he has any recommendations for how to improve the programs, he said, “They should ... give more contracts to the minorities so they will feel ... included ... and part of the [industry].” [#I-20]

**A number reported on other suggestions for how any or all of the participating entities can improve, or for any other insights, feedback or recommendations.** Examples included:

- The white male person with disabilities owning a TGB/CERT-certified specialty contracting firm commented that the portals used by public entities are difficult to use and should be improved. [#I-12]
- A male representative of a minority immigrant business association suggested that public entities communicate better with minorities. He said, “Communication is the key.” [#TO-5]
- The African American male owner of a specialty services firm stated there should be a government program that makes loans for minorities, women and other disadvantaged groups more accessible. He said the interest rates are sometimes too high for these groups, and added, “Some of them don’t have that good [of] credit, and ... [this] doesn’t allow them to move much. So, the government should try to put in place some policy that [would] really be attractive to them.” [#I-20]

The same business owner also stated the government should make more effort to “enlighten” minorities, women and other disadvantaged groups about contracting opportunities and programs; he said that distributing flyers and holding town hall meetings would be an effective way to do this. He commented, “Most [minorities] are not aware. They don’t know most [available programs] exist.” [#I-20]

- The white female attorney representing a chamber of commerce, when asked about any other insights or recommendations, said that the harder it is for someone to apply for a contract or RFP, the harder it is for small businesses because they have less “people power” to take the time to fill out forms. She added that those forms should include more “plain language” to make them simpler for recent immigrants to fill out. [#TO-1]

- The Hispanic American representative of a Latino leadership organization suggested that Minnesota be specific and intentional in its goals of engaging more minority- and women-owned businesses. He commented, “Unless they are that intentional, they could easily get watered down .... ‘Well, we put the ad in the paper, but no one responded.’ That is a common thing .... Smaller businesses would say, ‘I didn’t know I could apply for that, [or] I thought you were looking for bigger businesses.’” [#TO-2]
- The Asian-Pacific American male representative of an immigrant business association stated that while the organization is “a vehicle” in bringing information to its members, the participating entities should try to bring program and contracting information directly to the community. He added, “Sometimes, [the organization] can’t do it all.” [#TO-11]
- The African American president of a minority immigrant organization said that helping to orient people so they don’t have to learn things by themselves, giving them guideposts in the form of a mentorship programs or a place to find access to information would be ways that participating entities can improve. He said that providing resources on getting bank loans such as a website that points them in the right direction would also be helpful. [#TO-7]
- A white male veteran co-owner of a professional services firm recommended, “... I think every project should be advertised on a website, and anybody who can possibly show that they’re licensed, insured, interested, and able to perform the job can put a bid in and be evaluated.” He said, “I don’t think we should say, ‘Since you’re a small company you can’t do this project.’” He also commented, “I think it should be advertised, clear, [and] transparent.” [#I-3]

The owner of a majority professional services firm commented that the State should “have a central location, one place where people can go and register, this is our product, these are our services, one location.” He indicated that this would allow the State to choose products and services that would suit its needs as well as set SBEs, MBEs, and WBEs on a more level playing field in their respective industries. [#I-14]

- When asked for any other suggestions or insights regarding how any of the participating entities can improve, an African American male owner of a MBE-certified professional services firm stated, “Just make sure the information for the procurement is out there clean and clear, nothing that is a bunch of bureaucracy ....” [#I-16]
- The African American female owning a MBE-, SBE- and WBE-certified professional services firm suggested that the entities more clearly broadcast their upcoming projects, explaining, “Every small business needs to work smartly... so if I know ‘x’ agency’s ‘gonna’ have this kind of work in 2018 then I’m ‘gonna’ focus my energy there.” [#I-17]
- The African American male owner of a MBE-certified specialty contracting firm mentioned that he would like to see programs more broadly advertised, since he had never heard of them. [#I-21]

- The Subcontinent Asian American owner of a professional services firm indicated that he would like the opportunity to have more visibility so that he can bid on State projects. [#I-28]
- The Hispanic American owner of a closed specialty contracting company commented that information on a website or Facebook would be beneficial to small and minority-owned firms. [#I-41]

The African American female owner of a certified (CERT, MBE, SBE, WBE) specialty contracting firm indicated that the entities could offer “entity specific training” on contracts or standard procedures and practices because each entity works differently. She added that another improvement would be opportunities for smaller businesses to network and make connections with the entities. [#I-22]

- The white woman partial owner of a DBE-, WBE-, TGB-certified professional services firm suggested a more defined process and a clear path for how small companies can break into contracts. [#I-32]
- The white woman owner of a DBE-, WBE- TGB-certified professional services firm said that she would like to see more direction on how the set-asides work. [#I-32A]
- The white male owner of a specialty contracting firm repeated that the participating entities should not be required to “take the low bid.” He said this prevents them from doing a good job of qualifying their contractors. [#I-51]
- The Subcontinent Asian American male representative of an 8(a), WBE-, MBE-CERT certified professional services firm noted that in other states, meetings are held where anyone (not just minority-owned businesses or small businesses) can attend and learn of an entity’s plans for contracting. He repeated that he would like to see transparency in the selection process. [#I-42]
- A white female owner of a DBE- WBE-certified specialty contracting firm when asked for any other insights or feedback, reiterated that the prevailing wage requirements are “ridiculous.” She indicated the requirements are a barrier preventing her firm from working directly with the state. [#I-56]

- The white female representative of an SBE-certified majority-owned construction firm recommended another state's procurement process. She said, "One of the Dakotas does this... they actually have a bidding system where if you want to bid on a project... you notify them by a certain date, and then those are the only people that you can select from for a DBE or anything like that. So, the prime contractors are always going to this location to see, 'Okay, who is bidding?' And it's just on this project, and the DBEs, the subs, they all know where to go." Explaining her own firm's situation, she indicated that "I think [MnDOT] has a feeling that ... DBEs will send us quotes... and we won't use them because we don't like them, and that is not the case. It's usually the low bidder, and if ... there's a DBE then we have to look at trying to get that goal if they're not the low bidder. Our policy here is that we always use the low bidder ... unless there's a goal on it, like I said, then we have to look at the non-low bidders." [#I-35]

The same business representative added another recommendation for public entities. She remarked, "You have to use just the people on the certain list. MnDOT has their list, City of St. Paul has their list, all of these different lists .... What would be ideal is if they could inform you through email when somebody goes on the list or somebody goes off the list." [#I-35]

- The white female owner of a [closed] DBE-, TGB-certified specialty contracting firm suggested that it might be helpful to have a person working for the State whose job it is to follow up with subcontractors to ensure that they are paid by primes in a timely manner. [#I-65]
- The Hispanic American male owner of an MBE- DBE- MUCB-, CERT/TGB-certified professional services firm said that the civil rights departments of the agencies should be more like advocates as well as enforcers. He said there should be projects for more integration and participation and that plenty of projects could be done by DBEs. He noted that a way to do this would be for several DBEs to combine forces and submit as a prime. [#I-43]
- A white male owner of a specialty contracting firm, when asked for any other insights or comments, said, "I don't know how they're ever going to stop it, but there [are] just so many people [who] don't have insurance, [and] guys ... getting paid cash. It just runs rampant." He said these people are paid cash to do the type of work his firm does. He added, "It gets even worse in the wintertime, because you can't see those people in the winter." [#I-57]
- The white male representative of a white woman-owned DBE-, WBE-, MUCP-, CERT/TGB-certified professional services firm recommended that participating entities give feedback on unsuccessful proposals. [#I-52]
- The white female owner of a certified construction firm (TGB, CERT, SBE, WBE, DBE, MCUB, SUBP) said basing projects on qualifications, competence and cost will lead to better relationships between primes and subcontractors. [#I-45]

- The Hispanic American male owner of a professional services firm noted that he would like to see more access to online bidding and it would be “nice to have a one-stop shop.” [#I-68]
- The Subcontinent Asian American male representative of a minority-owned goods firm recommended that the entities should reach out to firm with more information on the State programs and to encourage them to participate as a SBE, DBE, etc. He added that public entities should let people know what certification programs are and what their benefit is to small firms. He said that mass mail [email?] is not the way to go, but that perhaps putting something in the mail or getting in touch personally would be useful. [#I-66]
- The Hispanic American male owner of a certified (MBE, DBE, SBE, MNUCB, SUBP, CERT) professional services firm with respect to recommendations, noted that if the participating entities all went to one way to certify and one database and this database included all his information, including tax returns and personal financial statements, that would be helpful. [#I-67]
- The white male owner of a goods and services firm when asked for any other suggestions, insights or feedback for the participating entities, said, “Get rid of some of the red tape. There [are] too many restrictions.” [#I-69]

He continued, “I consider us a small company only being 50 employees, and yet the investment we have to do in order bid [is too much]. Now, if I just go ahead and [lose employees], it would be different. So, we’re better off not having as many employees, [but] I think the state wants to have people employed here.” [#I-69]

He went on to say, “In my eyes, the State of Minnesota talks out of both sides of their mouth. They want big business here, but they want small [businesses] to get all their contracts .... Quit labeling businesses [and] quit labeling people.” [#I-69]

- The white female owner of a certified specialty contracting firm (CERT, SBE, WBE, DBE, MCUB) commented on the topic of MNDOT’s audits, “I think when you do it year after year, it starts to get redundant.” She indicated there should be more consistency in their yearly auditing process. She said that different MNDOT representatives assess her firm differently each year. When her firm makes a change to appease one auditor, they will likely have to change again the following year to appease the next; she commented, “The next year, the next guy wants it ... changed [again].” [#I-44]

- The white female co-owner of a WBE-certified goods firm suggested “Making [procurement] less complicated.... There is nowhere else in the world, except in these publicly funded financing things, where all kinds of different organizations are constantly bringing people together to try to help figure out how to access those markets .... There’s a lot of money and energy being spent by all kinds of organizations holding seminars and meetings trying to tell people how they can get access to an opportunity to bid and they can save all that money and energy and spend it on something else.” [#I-27A]

- The African American co-owner of a MBE-certified goods and services firm reported, “Is there any way that through the bidding process you can enter yourself in and say, ‘I can take care of this part here’ ... and work with the prime contractor?” He added, “It seems like the companies that are getting those contracts are big enough where I can’t get to that [right] person [to discuss working with them].” [#I-62]

He went on to say, “It might be ... that they don’t know who I am [and] they don’t want to talk to me .... Truly it [might be] that vague. It might be that I can get to the work foreman who schedules the work and so on, but he does not do the bidding. It does me no good to talk to him .... So, it becomes very difficult to find that person.” [#I-62]

- An African American female owner of a specialty services firm serving persons with disabilities reported, “Information is key.” She recommended that information for small businesses be located in an easily found source online. [#I-55]
- The white male representative of a Hispanic American owned MBE-, DBE, SBE-DBE, MCUB-, SUBP- TGB-, CERT-certified professional services firm suggested that more opportunities with public entities for DBEs to meet them and learn about opportunities would be positive. [#I-29]
- A white female owner of a WBE-, DBE-, SBE-CERT-, TGB-certified professional services firm recommended that if MnDOT requires project management software on their projects, they should provide training on the software. [#I-53]
- The white female owner of a goods and services firm serving persons with disabilities recommended, “The first thing I would tell them is stop thinking of themselves as separate entities ... stop dividing up the stream of what needs to be done .... Egos, budget divisions; all those other things. We’ve got to get more elevated thoughts ... into these positions so that the egos can go by the way and we can look at the bigger picture ....” [#I-60]

She added, “Second to unity, is getting things to be simple. If it is too complex, it is the wrong choice .... Because simple allows for the creativity of not just the person who is making the decision, but the person who is carrying it out ....” [#I-60]

- The white female owner of a certified (DBE, WBE, TGB, MCUB, SUBP) specialty contracting firm said that she would like to see a working capital fund, help with bonding and collaborating with other firms so they can bid on bigger projects. [#I-23]
- The African American male owner of a specialty services firm when asked for insights or recommendations said, “I think that [with] the entities, all of them involved, [and from] the cities to the rural towns ... it’s not a matter of racial disparity per se. It is a matter of the individual looking for financial help [and] bid equality. The business that is looking for help needs to be able to find a category they fit. The State has done a lot of work to narrow, to try to pigeonhole individual businesses or individual jobs, and they need to widen that so that they can see that whether it is a woman-owned business [or] a minority-owned business, that it is not just one thing or another. They have to look at the ability to do financing and to help a company be seen.” [#I-70]
- An African American female owner of a DBE-certified professional services firm remarked that the current state and local government programs, TGB/WBE/MBE, are necessary, but “the jury is still out” on the effectiveness of the programs. She added that participation in programs and gaining business are “successful measurables” for her firm. [PFP#26]
- An Asian American male owner of a CERT-certified services company commented that the flow of money from the State to the prime contractors is troublesome and he recommends monitoring of the programs for subcontractor participation. [PFP#27]
- A white female member of the public added that enforcement of hiring women-owned firms needs immediate improvements offering a number of entities and publications that might enhance procurement lists of women-owned firms. She added that disparities between minority- and women-owned firms and majority-owned firms need addressing. [PFP#8]
- A white female representative of a food council organization recommended that the food service industry be included in the disparity study stating, “... the big dogs [in the food service industry] have taken over ... and [that] causes challenges for equity ....” [PFP#12]
- The African American president of a minority immigrant organization indicated that access to information is needed for business owners. He added that access to mentors or networks of people who know a specific area and know all the sources of information would be helpful to immigrants who are new in their industries to succeed. [#TO-2]
- A white female member of the public forum indicated her appreciation for the study and public forum, commenting that living wages must be part of the study topics and that a \$9.50 minimum wage “is insulting.” [PFP#8]



- A Hispanic American male owner of a DBE-certified specialty-contracting firm commented that he has sought the insight of public officials, without results, regarding disparities in his specialty contracting industry. He commented that there is nothing in place to enforce compliance with goals. [PFP#13]
- A public forum participant reported that “violators of MWBE requirements need immediate sanctions ... simply sending ... notice ... or having a meeting is no incentive for them to actually meet the requirements ... this requires monthly site inspections ... and sanctions that cost them money ... that will get their attention better than the bureaucratic process.” For example, she added, “Give contractors 14 days to meet compliance, and if they miss the deadline, put them on a no-bid list.” [PFP#30]
- A white female owner of a DBE-certified professional services firm remarked that differences exist between agencies and large firms valuing diversity and those that attempt only to meet goals. [PFP#25]
- A focus group participant reported on unfair access to “contracting opportunities,” for some. This participant indicated that some public entities have a “level of comfort when ‘certain groups’ get access [to opportunities] and discomfort when ‘other groups’ get access to opportunities.” [#FG-4]

Referring to available funding going to the same repeat minority-owned firms, the same focus group participant added, “When minorities get it, they get it.” He added, however, that the amount is “embarrassingly low.” [#FG-4]

## **L. Input from Public Comment Period for Draft Report**

A total of 78 individuals attended public forums and/or participated in the comment period for the draft Disparity Study report. They provided input in person, and via email, comment card, webinar, and the telephone hotline. Of these, 31 individuals provided comments, including input provided from additional listening sessions in February 2018 hosted by the City of Minneapolis and MnDOT (a total of three sessions).

In addition, Keen Independent presented to the Construction Partnering Program at the Associated General Contractors of Minnesota offices.

Individuals providing comments from the public forums or via the webinar or comment cards are identified as “PFP” in Part L of this appendix. Participants who commented during the public comment period via email, telephone hotline, letter or listening session are referenced as “PC.”

Participants included business owners, and trade association and public entity representatives. In most cases, their comments were consistent with previous public input.

**Some public forum participants posed questions.** Questions asked at the public forums generally related to the process for accepting public comments as well as disparity study methodology and results. Some of the comments made via email also asked about the study.

A few questions were about the format for public forums and the process for submitting comments. (These questions were answered in the public forums.) Some comments indicated support for the studies and appreciation that the disparity studies were done.

Some questions pertained to disparity study methodology and results. For example:

- An Asian American male owner of a small business and a member of a minority contractors' association inquired about how the current study compared to previous studies. [PFP #31]
- A female public entity representative commented by email that she was interested in court cases dealing with the "but for" issue when "one or several large ethnically-owned businesses skew the disparity index over 100." [PC#5]
- The white male representative of an education and leadership organization asked if the study addressed the diversity of Minnesota including the Somali and Hmong communities and any disparities that they face. [PFP#50]
- The white male representative of a business development organization inquired how large firms related to the disparity study. He also asked how unionized firms, goods and services firms and others were studied and contributed to the study. [PFP#46]

**Other questions focused on how participating entities would use results or how programs operated. (These questions were also answered during the public forums.)** For example:

- An African American female representative of a business advocacy association asked if guidance and recommendations for change would be provided to the participating entities. [PFP#33]
- The African American female owner of a business consulting firm inquired if the study includes suggestions for evaluating success and measurements of success for public entities to utilize. [PFP#40]
- An African American female representative of a public entity reported, "... it rolled [disparity study] out to its policymakers ... Council Member Gordon did give staff direction to departments inside the City to go back and look at the recommendations ... and come back with the ones that we believe our policymakers should adopt ...." [PFP#36]
- A public forum participant who attended the public forum held via webinar inquired, "Is there a data place ... where contractors can search for MWBE companies or vice versa?" [PFP#53]

In response to her question, a public entity representative attending the webinar responded, "There currently is not a central place that contractors can search for certifications across the three entities." [PFP#54]

- The Asian American female representative of a small professional services firm expressed concern that the disparity study results would be interpreted as “Asian American business owners did not face disparities in the marketplace.” [PFP#42]

The same business representative reported that she faced “a big obstacle” to securing work. She remarked that large Asian American-owned firms secure opportunities, as well as, firms in “the good ol’ boy network.” She concluded that smaller minority-owned firms do not have equal chances at securing the same opportunities. [PFP#42]

- A male representative of a “military action group” commented that “it looks like we’re [veterans] not a ‘disparity.’” He inquired about veteran-owned business participation in the study. [PFP#43]

**Public forum participants reported on the challenges and unfair treatment they and others faced in the Minnesota marketplace.** Input from the public comments was similar to comments from other business owners in the study:

- A white male representative of an industry trade association, regarding challenges faced by members of his association, commented that “the construction industry ... has higher barriers to entry than other market sectors ....” [PC#1]
- The African American female owner of a professional services firm and representative of a minority trade association remarked that in her industry, she faced challenges and lacked opportunities to expand. [PFP#44]
- An African American male owner of a DBE-certified construction-related firm reported, “It is hard to get work in this area.” [PFP#51]

The same business owner indicated that “state people” approached his employees on sites and informed them that if they are experiencing problems, they can file a complaint. He further explained that this type of behavior by “state people” caused “trouble”; he reported that his firm was treated differently in this respect from majority-owned firms. [PFP#51]

- The Asian American male owner of a small business and a member of a minority contractors’ association remarked, “... minority businesses are suffering tremendously compared to Caucasian, female-owned companies ... for us to get in the door it’s so difficult.” [PFP#31]

The same business owner commented, “... we saw that the State of Minnesota Department of Administration is trying to level the playing field ... now we have several entities here .... What prevents them from trying to implement that preference program which has a ceiling of \$500,000?” [PFP #31]

- An African American male owner of a goods and services firm remarked, “Hopefully, we’re addressing cooperative contracting ... hopefully less used contractors are also being addressed ... and ... local entities are starting to open up more to us small businesses, but now we see the manufacturers are closing doors ... we’re being squeezed out kind of both ends and it tends to be suffocation at times.” [PFP#38]
- The Asian American female owner of a specialty-contracting firm inquired if after the study, “low bid” contracting would continue [which she saw as a barrier to small business entry into the marketplace]. [PFP#39]

To answer her question, a white male public entity representative responded that in his county, “... an alternative to low bid procurement for construction ... permits best value ....” [PFP#40]

- Regarding “low bid,” the white male representative of an industry trade association stated, “... the low-cost standard has the effect of undermining the MBE goal ....” He commented that public entities should be more transparent by disclosing percentages of MBE contracts and “any added cost beyond market established prices for using MBE subcontractors ....” [PC#1]
- An African American male representative of the same minority trade association added, “I ... hope that all the entities start to look a little bit more at goods and services ....” He also commented that his firm has three employees where his competitors often have significantly more employees, causing him barriers. He suggested that “... to really expand minority utilization would be a strong goods and services program ....” [PFP#45]

**A number of public form participants reported on union requirements and other processes affecting small businesses.** These included:

- The Hispanic American male owner of a specialty contracting firm reported that his firm is a signatory with two unions. He commented that different viewpoints exist regarding unions. He said, “One of the unions told me that [it] ... loves having minority contractors because ... it gives ... a leg up that non-union contractors would have meeting requirements.” He added, “The [other] local union, could care less ....” [PFP#48]
- An Asian American owner of a construction-related firm reported coming from “a union background.” He commented that minority-owned firms faced challenges with unions that require high “ratio[s].” [PFP#47]

He added, “Unions are often required, or contractors are often required to have a three-to-one ratio of journeymen-to- apprentice ... if there’s no minority people who are already journeymen ... you can’t bring in any new bodies to engage in the marketplace ....” [PFP#47]

- The white male representative of an industry trade association reported that “the state’s MBE requirements ... conflict with laws regarding labor unions.” [PC#1]

He added, “... the unions have a legitimate right under NLRA to protect [their] work by requiring union only subcontractors, and the state MBE requirements conflict with this right and provide no mechanism to resolve the conflict ....” [PC#1]

- A female owner of a SBE/WBE-certified specialty contracting firm reported by email, “... some of the aspects of the subcontracting process ... could actually become detrimental to the success of Targeted Group Businesses in Minnesota ....” [PC#6]

**An African American female public forum participant reported on her inability to enter the construction industry in Minnesota, despite industry training, certifications and repeated attempts to secure work.** She commented:

- An African American female trying to enter the construction industry expressed facing repeated barriers. She commented that she had sought out relevant training and certificates to perform in the construction industry in Minnesota as a flagger, however, she had not secured a job after repeated attempts. [PFP#49]

She reported, “... I went to the union, I went to different construction sites where they said that they needed minority women workers ... and I was rejected everywhere ....” She further said, “So I was just letting everyone know that it is kind of hard for minority women to get in the construction field even when you are [qualified].” [PFP#49]

She remarked that colleagues in her training classes secured work in the construction industry because “their aunties or uncles worked in the construction field, so they had their foot in the door already.” [PFP#49]

**Public forum participants made comments regarding access to capital, prompt payments, bonding and insurance. Many made similar comments to other business owners included in the study who expressed challenges obtaining all three.** These comments were similar to other public input received through the study:

- The Hispanic American representative of an MBE-certified professional services firm reported by comment card, “... access to capital, loans and fiscal management tools for small minority- owned businesses ... are severely lacking ... bonding is almost non-existent.” [PC#4]

- A white male representative of a contracting industry trade association, via email, reported, “The construction discipline is a capital intense, highly competitive, low profit margin and high-risk market sector.” [PC#1]

He added, “Start-up and smaller businesses who struggle with cash flow may fail, compromise performance, or become recalcitrant when they are not paid timely for their work.” [PC#1]

Regarding financing, he further added, “Prime contractors cannot afford to serve as the bank to fund agency projects ....” [PC#1]

- The Hispanic American male representative of a business development association who owned a MBE- and TGB-certified professional services firm commented that access to capital was challenging for most small businesses by saying that “there are a lot of access to capital issues.” [PFP#52]

He added that “pricing is a premium” and “lack of networks” were also barriers for small businesses. Furthermore, he recommended that small firms seek business assistance in developing their business plans prior to applying for business loans. [PFP#52]

- A female owner of a WBE-certified specialty contracting firm reported by email that “Duty to Defend contract requirements, retention withholding and prompt payment” issues caused challenges for small firms in the Minnesota marketplace. [PC#6]

The same business owner added, “Another debilitating challenge our company has ... encountered while performing work on public projects is the lag time in retainage payment.” [PC#6]

- Regarding barriers with insurance and liability, the African American male owner of a DBE-certified construction-related firm reported that, in comparison, his firm was responsible for “property damages and losses” more than majority-owned firms were responsible. [PFP#51]

- An Asian American male owner of a construction-related firm reported facing late-payment challenges that impacted his cash flow. He commented that if a problem happened with a certified payroll or other issue, he was not paid by the public entity or prime. He explained, “My cash flow is gone ....” [PFP#47]

The same business owner added, by a hotline phone call, “... nonpayment from primes lead his firm to go into debt, run out of resources and eventually go out of business.” [PFP#47]

- A female representative of a WBE-certified and unionized construction-related firm commented by email that some public entities in the Minnesota marketplace are “offenders” of withholding retainage for up to four years. She reported, “This results in a loss of profit and money that can be used to pay labor, bills and grow our business.” [PC#7]
- The African American male owner of a DBE-certified construction-related firm indicated that public entities in Minnesota were interested in “employees” receiving their payments; however, they were not concerned about minority business owners receiving payments in a timely fashion. [PFP#51]

The same business owner expressed his frustration that primes often offered to help minority-owned firms secure bonding; however, in practice, it rarely happened. [PFP#51]

**Public forum participants offered suggestions to improve certification programs and contracting, procurement and accountability practices.** Comments that are similar to others in the study follow:

- By email, the male representative of a professional services firm reported that he faced challenges securing contract opportunities with Minnesota public entities and recommended that “improving purchasing practices [by having] documented procedures in place that apply to the entire Minnesota State Colleges and Universities system.” [PC#3]
- The African American male owner of a DBE-certified construction-related firm suggested that the DBE program in Minnesota “should be tightened up ... people are saying they are minorities when they really aren’t ... ‘shell companies’ operate out there ....” [PFP#51]
- An African American female owner of a professional services firm and representative of a minority trade association inquired how accountability will be measured for “individuals who are saying they were trying.” [PFP#44]
- The male representative of a specialty contracting firm, by email participation, made suggestions for public entities including increasing the “unbundle” of contracts, abolish “good faith efforts,” “reward compliant general contractors,” and issue bids in a way that eliminates “bid shopping.” [PC#2]
- Via a comment card, the Hispanic American male owner of a specialty contracting firm recommended that certification programs require “training and grading level[s] based on years in business [and] size.” [PFP#48]

- The white male representative of an industry trade association suggested that public entities “should be compelled to provide more helpful and accurate information concerning eligible MBEs in the marketplace ....” [PC#1]

To this, he added, “It would further help to have the agencies provide vetted lists of contractors that include the contractor’s available scopes of work, available project size capacity, and MBE accreditation ... [and] tracking and measuring performance outside of the goal-based program is worth pursuing ....” [PC#1]

Finally, the same industry trade association representative recommended that “better and more accurate information should be shared to build credibility and support for the MBE program ....” [PC#1]



## APPENDIX K.

### Summary of Participating Entity Programs

Each participating entity operates certain programs providing preferences or assistance to minority- and women-owned businesses, businesses owned by persons with disabilities, veteran-owned businesses, businesses in economically disadvantaged areas and/or small businesses.

Each participating entity provided information about its programs, which Keen Independent supplemented from other sources.

Appendix K is organized as follows:

- A. Program descriptions;
- B. Program eligibility;
- C. Program application; and
- D. Examples of other business assistance.

#### A. Program Descriptions

A summary of participating entities' programs follows. Each entity's website provides more detailed information. Figure K-1 on the following page identifies the major programs applied by each entity.

**Federal DBE Program.** The U.S. Department of Transportation requires state and local governments receiving funds from the Federal Highway Administration, Federal Transit Administration and Federal Aviation Administration to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation. As such, the Minnesota Department of Transportation, Metropolitan Council and Metropolitan Airports Commission have many contracts where they apply the Federal DBE Program, typically by setting DBE contract goals.<sup>1</sup>

Note that for entities including the City of St. Paul, City of Minneapolis and Hennepin County, MnDOT sets the DBE contract goal and monitors compliance on these local governments' USDOT-funded contracts.

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.<sup>2</sup>

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<sup>1</sup> See <https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm>.

<sup>2</sup> See <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise>.

**Federal ACDBE Program.** An agency receiving FAA funds is also required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to certain airport concessions activities. The MAC operates the Federal ACDBE Program.<sup>3</sup>

Figure K-1.  
Program application by participating entity, 2016

| Agencies                  | Federal DBE Program (USDOT) | Federal ACDBE Program (USDOT) | HUD Programs | EPA DBE Program | TGB     | VO/VET | Econ. Disadv. Business | MCUB | SUBP | VOP | SBE |
|---------------------------|-----------------------------|-------------------------------|--------------|-----------------|---------|--------|------------------------|------|------|-----|-----|
| Minn Dept. of Admin       |                             |                               |              |                 | ■<br>1/ | ■      | ■                      |      |      |     |     |
| MnDOT                     | ■                           |                               |              |                 | ■       | ■      |                        |      |      |     |     |
| Minnesota State (MnSCU)   |                             |                               |              |                 | ■       | ■      | ■                      |      |      |     |     |
| MAC                       | ■                           | ■                             |              |                 | ■<br>2/ |        |                        |      |      |     |     |
| Met Council               | ■                           |                               |              | ■               |         |        |                        | ■    |      |     |     |
| Mosquito Control District |                             |                               |              |                 | ■       | ■      | ■                      |      |      |     |     |
| Hennepin County           | ■                           |                               |              |                 |         |        |                        |      |      |     | ■   |
| City of Minneapolis       | ■                           |                               |              |                 |         |        |                        |      | ■    |     |     |
| City of St. Paul          | ■                           |                               | ■            |                 |         |        |                        |      |      | ■   |     |

1/ Not including African-American for professional services or other services; American Indian for other services, and Asian American for construction subcontracts.

2/ Not including African American for construction subcontracts; American Indian for professional services.

<sup>3</sup> See [https://www.faa.gov/about/office\\_org/headquarters\\_offices/acr/bus\\_ent\\_program/](https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/).

**U.S. Housing and Urban Development MBE Program and Section 3 Program.** HUD has its own MBE Program that extends requirements to open contract opportunities for minority- and women-owned firms to state and local agencies receiving HUD financial assistance. This includes local public housing agencies. These agencies must provide regular reports of MBE and WBE participation to HUD.<sup>4</sup> Information related to grantees is also available.<sup>5</sup> HUD also has a Section 3 Program that encourages utilization of residents and businesses in HUD-supported projects.

**U.S. Environmental Protection Agency DBE Program.** As with HUD, the U.S. EPA has a DBE Program that encourages participation of minority- and women-owned firms, and other groups, in state and local contracts receiving EPA financial assistance.<sup>6</sup>

**Minnesota Targeted Group Business Program.** The Minnesota Department of Administration and several other agencies operate a Targeted Group Business Program that provides preferences to certified minority- and women-owned firms and companies owned by people with a substantial physical disability located in Minnesota. The program does not apply to certain federally-funded contracts.<sup>7</sup>

**Minnesota Economically Disadvantaged Business Program.** Similar to the TGB Program, the Minnesota Department of Administration provides preferences for small businesses certified as economically disadvantaged small businesses. A company located in an economically disadvantaged county, which includes federally-designated labor surplus areas and low-income counties, can be certified as an economically disadvantaged small business. A firm can also be certified as such if the owner resides in an economically disadvantaged area.<sup>8</sup>

**Minnesota Veteran-owned Business Program.** The Minnesota Department of Administration and several other entities operate a Veteran-owned Business Program (VO or VET Program) in parallel to other programs, including contract goals and application of price or evaluation preferences. A firm owned and controlled by a veteran and located in Minnesota can be certified under this program.<sup>9</sup>

**City of St. Paul Vendor Outreach Program (VOP).** The City of Saint Paul applies its Vendor Outreach Program to small businesses and minority- and women-owned businesses.<sup>10</sup> The City sets contract goals for MBEs, WBEs and SBEs in its contracting. It relies on certification through the CERT System.<sup>11</sup>

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<sup>4</sup> See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/sdb/guide/pop](http://portal.hud.gov/hudportal/HUD?src=/program_offices/sdb/guide/pop).

<sup>5</sup> See <https://www.hudexchange.info/resource/248/guidance-on-minority-business-enterprise-and-womens-business-enterprise-outreach/>.

<sup>6</sup> See [https://www.epa.gov/sites/production/files/2013-09/documents/final\\_dbe\\_rule.pdf](https://www.epa.gov/sites/production/files/2013-09/documents/final_dbe_rule.pdf).

<sup>7</sup> See <http://www.mmd.admin.state.mn.us/mn02001.htm>.

<sup>8</sup> See <http://www.mmd.admin.state.mn.us/mn02001.htm>.

<sup>9</sup> See <http://mn.gov/admin/business/vendor-info/oep/sbcp/vo/>.

<sup>10</sup> See <https://www.stpaul.gov/departments/human-rights-equal-economic-opportunity/contract-compliance-business-development-11>.

<sup>11</sup> See <https://cert.smwbe.com/>.

**Hennepin County Small Business Enterprise (SBE) Program.** Hennepin County has an SBE Program for small business enterprises. The County relies on certification through the CERT System.<sup>12</sup>

**City of Minneapolis Small Underutilized Business Program (SUBP).** The City of Minneapolis operates the Small Underutilized Business Program for minority- and women-owned firms.<sup>13</sup> Eligible companies must be DBE-certified and located within the 11-county region.

**Metropolitan Council Underutilized Business (MCUB) Program.** In addition to operating the Federal DBE Program for USDOT-funded contracts, the Metropolitan Council applies the MCUB Program to non-federally funded contracts. MCUB businesses include certified Targeted Group Businesses, DBE-certified businesses based in Minnesota and veteran-owned businesses certified by the Department of Veteran Affairs or the Department of Administration. For the MCUB Program, the Metropolitan Council mirrors Federal DBE Program regulations.<sup>14</sup>

## **B. Program Eligibility**

Figure K-2 summarizes eligibility and certification requirements for each program, and identifies certifying agencies. In general, certification limits eligibility based on:

- Revenue or employment size of business;
- Personal net worth of the business owner (for Federal DBE and ACDBE Program);
- Location of business; and
- Race, ethnicity or gender of business (for race- and gender-conscious programs).

Note that both the City of St. Paul and Hennepin County programs use CERT certification.

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<sup>12</sup> See <https://cert.smwbe.com/>.

<sup>13</sup> See <http://www.ci.minneapolis.mn.us/civilrights/contractcompliance/subp/WCMS1P-124726>.

<sup>14</sup> See <http://www.metrocouncil.org/About-Us/Organization/Office-of-Equal-Opportunity/Small-Business-Programs/Metropolitan-Council-Underutilized-Business-Program.aspx>.

Figure K-2.

Summary of certifications used under each participating entity program

|  | Federal DBE Program (USDOT) | Federal ACDBE Program (USDOT) | EPA DBE Program | TGB | VOB | Econ. Disadv. Business | MCUB | SUBP | VOP (CERT) | SBE (CERT) |
|--|-----------------------------|-------------------------------|-----------------|-----|-----|------------------------|------|------|------------|------------|
| <b>Firm ownership eligibility criteria</b>                                   |                             |                               |                 |     |     |                        |      |      |            |            |
| Minority-owned small businesses  | ■                           | ■                             | ■               | ■   |     |                        | ■    | ■    | ■<br>**    | ■          |
| Women-owned small businesses   | ■                           | ■                             | ■               | ■   |     |                        | ■    | ■    | ■<br>**    | ■          |
| Other small businesses   | *                           |                               |                 |     |     |                        | *    |      | ■<br>**    | ■          |
| Small businesses owned by persons with disabilities                          | *                           | *                             |                 | ■   |     |                        | ■    |      |            |            |
| Veteran-owned small business   |                             |                               |                 |     | ■   |                        | ■    |      |            |            |
| Small businesses (or owners) located in labor surplus or low income counties |                             |                               |                 |     |     | ■                      |      |      |            |            |
| <b>Firm location eligibility criteria</b>                                    |                             |                               |                 |     |     |                        |      |      |            |            |
| 11-County Metro Area   |                             |                               |                 |     |     |                        |      | ■    |            |            |
| 15-County Metro Area   |                             |                               |                 |     |     |                        |      |      | ■          | ■          |
| Minnesota  |                             |                               |                 | ■   | ■   | ■                      | ■    |      |            |            |
| United States  | ■                           | ■                             | ■               |     |     |                        |      |      |            |            |

\*Can apply for social disadvantage under the Federal DBE Program

\*\*Separate contract goals for MBE, WBE and SBE

Figure K-3 presents relevant certifications and certifying agencies for the programs operated by each participating entity.

Figure K-3.

Summary of certifications used and certifying agencies for participating entity programs

|                           | Certification  |   |   |  |  |   |
|---------------------------|--|---|---|--|--|---|
|                           | DBE<br>ACBE  | CERT  | TGB<br>(MBE/WBE/Disability)   | Other  | Economic<br>Disadvantaged                              | Veteran   |
| Minn Dept.<br>of Admin    |  |   | ■<br>Admin certifies TGB firms  |  | ■<br>Admin certifies ED firms                          | ■<br>Admin certifies Veteran firms                      |
| MnDOT                     | ■<br>MnDOT certifies DBE firms   |   | ■<br>MnDOT uses Admin TGB directory   |  |  | ■<br>MnDOT uses VetBiz.com directories                  |
| MnSCU                     |  |   | ■<br>MnSCU uses Admin TGB directory   |  | ■<br>MnSCU uses Admin ED directory                     | ■<br>MnSCU uses Admin Veteran directory                 |
| MAC                       | ■<br>MAC certifies DBE/ACDBE firms                                     |   | ■<br>MAC uses the Department of Administrations TGB (M/W/D) Certification Directory |  |  |   |
| Met Council               | ■<br>Met Council certifies DBE firms and maintains the MnUCP directory |   |   | ■<br>MCUB accepts certified TGB or DBE certified businesses based in Minnesota; or Minnesota Veteran-owned businesses certified by the Department of Veteran Affairs, or by the Minnesota Department of Administration |  |   |
| Mosquito Control District |  |   | ■<br>Mosquito Control District uses Admin TGB directory                             |  | ■<br>Mosquito Control District uses Admin ED directory | ■<br>Mosquito Control District uses Admin Vet directory |
| Hennepin County           |  | ■<br>Hennepin accepts the CERT (SBE/MBE/WBE) program  |   |  |  |   |
| City of Minneapolis       |  |   |   | ■<br>City of Minneapolis certifies small and underutilized businesses (accepts DBE certification within 11-county area)  |  |   |
| City of St. Paul          |  | ■<br>Lead agency of the CERT program and certifies firms as small businesses, and women- and minority-owned businesses (SMWBES) |   |  |  |   |

### C. Program Application

Each program uses a set of tools to encourage participation of minority- and women-owned businesses or other groups.

**Price preferences.** The TGB Program, Veteran-owned Business Program and Economically Disadvantaged Business Program apply price preferences (or other point preferences) for certified firms when bidding or proposing on certain procurements. The preference can be as much as 6 percent. Sometimes there is a limit on the amount of price preference applied (e.g., maximum of \$60,000).

**Contract goals.** Certain programs include use of 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. Participating entities can set 0 percent goals or not set a goal at all in certain instances (for example, when there are very limited subcontracting opportunities on a contract).

Programs that provide for use of contract goals include the Federal DBE Program, TGB Program, Veteran-owned Business Program and Economically Disadvantaged Business Program, The Met Council's MCUB Program, City of Minneapolis' SUBP Program, City of Saint Paul's Vendor Outreach Program and Hennepin County's SBE Program.

**Sheltered market programs.** A sheltered market program limits participating in bidding for certain procurements to certified firms. For example, the City of Minneapolis operates a Target Market Program for small businesses and Hennepin County has a similar program. Admin operates an Equity Select Program for TGBs.

### D. Examples of Other Business Assistance

Service providers such as MEDA, the Minnesota Procurement Technical Assistance Center, local chambers and trade associations, and other groups offer basic to specialized business assistance services for companies in all stages of development (startup and business development through growth planning). Some of the business service providers specifically target needs of minority- and women-owned businesses and other small businesses through one-on-one consulting and business counseling.

Access to capital is a major barrier for minority- and women-owned businesses. Programs focusing on entrepreneurs of color include:

- MnDOT's Working Capital Loan Fund (WCLF) for certified DBE firms under contract on MnDOT-funded projects;
- Minnesota Emerging Entrepreneur Loan Program (ELP) for businesses operated by minorities, low-income persons, women, veterans and/or persons with disabilities;
- Small Business Administration (SBA) small business loans and microloans to qualified businesses; and
- Financing through Accion, a national non-profit small business lender.

Other groups provide bonding assistance.

Some of the participating entities are employing highly targeted programs for specific types of procurement opportunities. For example, Admin is implementing the SITE Program for IT consultants, Hennepin County has a job order contracting (JOC) program for prequalified contractors and consultants in certain fields, Saint Paul encourages participation of CERT-certified businesses in contracts under \$50,000 in particular types of work. Other entities have specialized programs as well.

Examples of other race- and gender-neutral alternatives in which entities participate include the following:

- Providing technical and managerial assistance and other training;
- Simplification of bidding procedures;
- Non-discrimination provisions;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payment;
- 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 to acquaint small firms with large firms;
- Creation and distribution of directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.

Each of these types of neutral measures were cited as examples in federal court decisions that have reviewed narrow tailoring of MBE programs.<sup>15</sup>

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<sup>15</sup> See e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see Appendix B.