APPENDIX A.
Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2016 Disparity Study. The following definitions are only relevant in the context of this report.

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

Availability analysis. The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing, and able to perform transportation-related construction and engineering work for MDT or local agencies in Montana.

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

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

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

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

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

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

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

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

Contractor. A contractor is a business performing construction contracts.

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

Disadvantaged Business Enterprise (DBE). A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26). Member 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 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.

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

Engineering-related services. For purposes of this study, services such as surveying, transportation planning, environmental consulting, construction management and certain related professional services.

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

ESB. See "Emerging Small Business."

Establishment. See "business establishment."

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

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.

Firm. See "business."

Federally-funded contract. A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with United States Department of Transportation financial assistance, including loans. As used in this study, it is synonymous with "USDOT-funded contract."

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

Local agency. A local agency is any city, county, town, tribal government, regional transportation commission or other local government receiving money through MDT.

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

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

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

- Black Americans (or "African Americans" in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- 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 counted as MBEs in this study (where that information is available).

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

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

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

Montana Department of Transportation (MDT). MDT is the steward of the State of Montana's transportation system. MDT is responsible for building, maintaining, and operating the state highway system. In addition, MDT works with various partners to maintain and improve local transportation infrastructure.

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

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

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for an end user, such as MDT.

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the project owner, such as MDT.

Prime contractor. A prime contractor is a construction firm that performs a prime contract for an end user, such as MDT.

Project. A project refers to an MDT or local agency transportation construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are programs in which businesses owned by some minority groups or women may participate but majority-owned firms typically may not. A DBE contract goal is one example of a race- and gender-conscious measure.

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

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

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

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most MDT and local agency contracting dollars are located. The relevant geographic market area is also referred to as the "local marketplace." Case law related to race- and gender-conscious programs requires disparity analyses to focus on the "relevant geographic market area."[1]

Remedial measure. A remedial measure, sometimes shortened to "remedy," is a program designed to address barriers to full participation of minorities or women, or minority- or women-owned firms.

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

Small Business Enterprise (SBE). A firm certified as a small business according to the size criteria of the certifying agency.

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

State-funded contract. A state-funded contract is any contract or project that is entirely funded with State of Montana, local government and other non-USDOT funds. As these contracts do not

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

include federal funds, the Federal DBE Program does not apply.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant's contract for a customer such as MDT.

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 MDT.

Subcontract goals program. A program in which a public agency sets a percent goal for participation of DBEs, MBE/WBEs, ESBs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.

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

Subrecipient. A subrecipient is a local agency receiving financial assistance from the United States Department of Transportation, passed through MDT.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project (or in some cases sells supplies directly to MDT).

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.

Utilization. Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (for example, DBEs).

WBE. Woman-owned business enterprise. See women-owned business.

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

APPENDIX B.
Legal Framework and Analysis

Prepared by Holland & Knight LLP

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized ("MAP-21," "SAFETEA" and "SAFETEA-LU"),[1] and the United States Department of Transportation ("USDOT" or "DOT") regulations promulgated to implement TEA-21 known as the Federal Disadvantaged Business Enterprise ("DBE") Program,[2] and local minority and women-owned business enterprise ("MBE/WBE") programs to provide a summary of the legal framework for the disparity study as applicable to the Montana Department of Transportation (MDT).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.[3] *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. Pena*,[4] ("*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 MDT's participation in the Federal DBE Program.

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[1] Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

[2] 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").

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

[4] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

The legal framework then 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 MDT's disparity study and the strict scrutiny analysis. In particular, this analysis reviews the Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*[5] and *Western States Paving Co. v. Washington State DOT,*[6]. and the recent U.S. District Court decisions in the Ninth Circuit in *Mountain West Holding Co. v. Montana, Montana DOT, et. al.* [7], *and M.K. Weeden Construction v. Montana, Montana DOT, et. al.* [8]

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*, ("*AGC, SDC v. Cal. DOT*" or "Caltrans"), the Ninth Circuit in 2013 upheld the validity of California DOT's DBE Program implementing the Federal DBE Program. In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT's DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In *Mountain West Holding* and *M.K. Weeden,* two U.S. District Courts in Montana upheld the validity of the Montana Department of Transportation's implementation of the Federal DBE Program. The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.[9]

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency's or recipient's implementation of the DBE program, including *Northern Contracting, Inc. v. Illinois DOT,*[10] *Sherbrooke Turf, Inc. v. Minn DOT, Gross Seed v. Nebraska Department of Roads,*[11] *Adarand Construction, Inc. v. Slater*[12] *("Adarand VII")*, *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.,*[13] *Geyer Signal, Inc. v.*

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[5] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, (9th Cir. April 16, 2013); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, (9th Cir. April 16, 2013)

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

[7] *Mountain West Holding Co., Inc. v. Montana,* 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit.

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

[9] *Mountain West Holding v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

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

[11] *Sherbrooke Turf, Inc. v. Minn. DOT* 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

[12] 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*").

[13] 2015 WL 1396376 (N.D. Ill. March 24, 2015), *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit, Docket No. 15-1827.

Minnesota DOT,[14] *Dunnet Bay Construction Co. v. Illinois DOT*, [15] *Geod Corporation v. New Jersey Transit Corporation*[16], and *South Florida Chapter of the A.G.C. v. Broward County, Florida.*[17]

The analyses of *AGC, SDC v. Cal. DOT*, *Western States Paving, Mountain West Holding, Inc., M.K. Weeden,* and these other recent cases are instructive to MDT and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by recipients of federal financial assistance governed by 49 CFR Part 26. They also are applicable in terms of the preparation of its DBE Program by MDT submitted in compliance with the Federal DBE regulations.

Following *Western States Paving*, the USDOT, in particular for agencies in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.[18] The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.[19] The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.[20]

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation."[21]

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."[22] Accordingly, the USDOT has advised federal aid recipients that any

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

[15] *Dunnet Bay Construction Co. v. Illinois DOT*, et. al. 2014 WL 552213 (C. D. Ill. 2014) *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit, Docket No. 14-1493.

[16] *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 2015 WL 4934560 (7th Cir. August 19, 2015); 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).

[17] 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[18] Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], *available at* 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm; *see* 49 CFR § 26.9; *see also* 49 CFR Section 26.45.

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

[20] *Id.*

[21] *Id.*, 49 CFR § 26.9.

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

use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.[23]

Recently in the Ninth Circuit, the Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' current implementation of the Federal DBE Program is constitutional.[24] The Ninth Circuit held that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.[25]

The two recent District Court decisions in Montana in *Mountain West Holding*[26] *and M.K. Weeden*[27] followed the AGC, *SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

Also, recently the Seventh Circuit Court of Appeals in Illinois in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.,* upheld the implementation of the Federal DBE Program by the Illinois DOT.[28] The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence IDOT exceeded its authority under federal law.[29]

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

[24] *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT,* 713 F. 3d 1187, (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT,* U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing*, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187, (9th Cir. April 16, 2013).

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

[26] *Mountain West Holding*, 2014 WL 6686734, *appeal pending*.

[27] *M.K. Weeden*, 2013 WL 4774517.

[28] 2015 WL 4934560 (7th Cir. August 19, 2015).

[29] *Id.*

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

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

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to past discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary."[31] 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.[32] 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.[33]

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.,[34].

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[30] 488 U.S. 469 (1989).

[31] 488 U.S. at 500, 510.

[32] 488 U.S. at 480, 505.

[33] 488 U.S. at 507-510.

[34] 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States,* 433 U.S. 299, 307–308, 97 S.Ct. 2736, 2741.

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." [35]

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." [36] "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." [37]

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."[38] 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." [39]

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."[40] "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."[41]

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."[42]

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[35] 488 U.S. at 501 *quoting Hazelwood,* 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

[36] 488 U.S. at 502.

[37] *Id.*

[38] 488 U.S. at 509.

[39] *Id.*

[40] 488 U.S. at 509.

[41] *Id.*

[42] 488 U.S. at 492.

2. *Adarand Constructors, Inc. v. Pena* ("*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.

C. The Legal Framework Applied to the Federal DBE Program and State and Local Government MBE/WBE Programs

The following provides an analysis for the legal framework focusing on recent key cases regarding the Federal DBE Program and state and local MBE/WBE programs, and their implications for a disparity study. The recent decisions involving the Federal DBE Program are instructive to MDT and the disparity study because they concern the strict scrutiny analysis and legal framework in this area, and implementation of the DBE Program by recipients of federal financial assistance (like MDT) based on 49 CFR Part 26.

1. The Federal DBE Program

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.[43] Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 ("SAFETEA"). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").[44]

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.[45]

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps

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[43] *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter "The Compelling Interest"); *see Adarand VII*, 228 F.3d at 1167-1176, *citing The Compelling Interest*.

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

[45] 49 CFR § 26.51.

a state or local government recipient must follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE program.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.[46] This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.[47] Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.[48] There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.[49] This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination. [50]

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts. [51]

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.[52] A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.[53]

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.

Fixing America's Surface Transportation Act'' or the "FAST Act" (December 3, 2015)

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[46] 49 CFR § 26.45(a), (b), (c).

[47] *Id.*

[48] *Id.* at § 26.45(d).

[49] *Id.*

[50] 49 CFR § 26.45(b)-(d).

[51] 49 CFR § 26.51.

[52] 49 CFR § 26.51(b).

[53] 49 CFR §§ 26.21-26.37.

On December 3, 2015, Congress passed the Fixing America's Surface Transportation Act (the "FAST Act"). It was signed by the President on December 4, 2015 as the new five year surface transportation authorization law.[54] The FAST Act continues the Federal DBE Program and makes "Findings" in Section 1101 (b) of the Act, including

Congress finds that —

> (A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;
>
> (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;
>
> (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;
>
> (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and
>
> (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

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

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[54] Pub.L. _____, H.R. 22, § 1101(b), December 3, 2015, _____ Stat. _____.

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provides "Findings" that "discrimination and related barriers" "merit the continuation of the" Federal DBE Program.[55] In MAP-21, Congress specifically finds as follows:

> "(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States;
>
> (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;
>
> (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;
>
> (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and
>
> (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business."[56]

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is "a compelling need for the continuation of the" Federal DBE Program.[57]

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

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) ("Final Rule") amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to $1.32 million dollars,

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

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

[57] *Id.*

provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.[58]

In particular, the Final Rule provided that a recipient's DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.[59]

In addition, the Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.[60] The recipient's DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.[61] The new Final Rule provided a list of "strategies" that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient's overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.[62] The new Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient's DBE program.[63]

The Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.[64] The Final Rule set out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.[65] The Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement

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[58] 76 F.R. 5083-5101.

[59] *See* 49 CFR § 26.37, 76 F.R. at 5097.

[60] 76 F.R. at 5097, January 28, 2011.

[61] *Id.*

[62] *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

[63] *Id.* at 5097, amending 49 CFR § 26.39(c).

[64] 76 F.R. at 5098, amending 49 CFR § 26.47(c).

[65] *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.[66]"

The Department stated in the Final Rule with regard to disparity studies and in calculating goals, that it agrees "it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."[67]

The United States DOT in the Final Rule stated that there is a continuing compelling need for the DBE program.[68] The DOT concluded that, as court decisions have noted, the DOT's DBE regulations and the statutes authorizing them, "are supported by a compelling need to address discrimination and its effects."[69] The DOT said that the "basis for the program has been established by Congress and applies on a nationwide basis…", noted that both the House and Senate Federal Aviation Administration ("FAA") Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled "The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses."[70] This information, the DOT stated, "confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program."[71]

US DOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)

DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).[72]

On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, "Disadvantaged Business Enterprise: Program Implementation Modifications" in the Federal Register.[73]

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[66] *Id.*, amending 49 CFR § 26.47(c)(5).

[67] 76 F.R. at 5092.

[68] 76 F.R. at 5095.

[69] 76 F.R. at 5095.

[70] *Id.*

[71] *Id.*

[72] 79 F.R. 59566-59122 (October 2, 2014).

[73] 77 F.R. 54952-55024 (September 6, 2012).

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.[74]

The Final Rule amending the Federal DBE Program at 49 C.F.R. Part 26 provides substantial changes and additions to the implementation and administration of the Federal DBE Program regulations in three primary areas:

(1) The Rule revises the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;

(2) The Rule revises the certification-related program provisions and standards; and

(3) The Rule amends and modifies several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.[75]

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.[76]

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE's profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;
- the overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;
- the submission of good faith efforts as a matter of "responsiveness" or as a matter of "responsibility", including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;

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[74] 77 F.R. 54952.

[75] 79 F.R. 59566-59622 (October 2, 1014).

[76] *Id.*

- guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;

- provisions relating to the replacing of DBEs; and

- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.[77]

In terms of forms and data collection, the new Rule attempts to simplify the Uniform Certification Application; establishes a new U.S. DOT personal net worth form to be used by applicants; establishes a uniform report of DBE awards or commitments and payments; captures data on minority women-owned DBEs and actual payments to DBEs reporting; and provides for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.[78]

The new Rule makes certain changes in connection with program administration, including: adding to the definitions of "immediate family members" and "spouse" domestic partnerships and civil unions; the retention of all records documenting a DBE's compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.[79]

The Rule also provides changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.[80]

USDOT Order 4220.1 (February 5, 2014).

USDOT Order 4220.1 is the USDOT's Order on the Coordination and Oversight of the DBE Program. According to the USDOT, this Order clarifies the leadership roles and responsibilities of the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE program. The Order further establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that the Departmental Office of Civil Rights will act as the lead office in the Office of Secretary for the DBE program. The Operating Administrations will continue to be the first points of contacts regarding, and primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

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[77] 79 F.R. 59566-59622.

[78] *Id.*

[79] *Id.*

[80] *Id.*

The USDOT Order also establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that these offices will engage in systematic coordination regarding the administration and implementation of the DBE program by DOT recipients.

The Order sets forth specific programmatic responsibilities for the Departmental Office of Civil Rights, the rules and responsibilities of the General Counsel as Chief Legal officer of the USDOT, and the Office of Small and Disadvantaged Business Utilization within the Office of the Secretary. The Order clarifies rules and responsibilities for the Operating Administrations in their overseeing of the day-to-day administration of the Federal DBE program by recipients, providing training and technical assistance, maintaining current and up-to-date DBE websites and, taking appropriate actions to ensure program compliance.

The USDOT Order also establishes the DBE Oversight and Compliance Council that will facilitate collaboration, communication, and accountability among the DOT components responsible for the DBE program oversight, and assist in the formulation of policy regarding DBE program management and operation. The Order provides that the Office of the General Counsel established DBE Working Group, which generates rules changes and official DOT guidance, will continue to coordinate the development of formal and informal guidance and interpretations, and to ensure consistent and clear communications regarding the application and interpretation of DBE program requirements.

The USDOT Order 4220.1 may be found at: www.civilrights.dot.gov/disadvantaged-business-enterprise.

2. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.[81] MDT's implementation of the Federal DBE Program also is subject to the strict scrutiny analysis if it utilizes race- and ethnicity-based efforts. 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.[82]

a. The Compelling Governmental Interest Requirement.

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[81] *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena* (*Adarand I*), 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas,* 133 S.Ct. 2411 (2013).

[82] *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; *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).

The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.[83] 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.[84]

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.[85] The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).[86]

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

[84] *Id.*

[85] *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *See Mountain West Holding,* 2014 WL 666734, *appeal pending.*

[86] *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe's* Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in *Rothe* below in Section G. *See also* the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al*, 885 F.Supp.2d 237, (D.D.C.).

Specifically, the federal courts found Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[87] The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).[88] 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.[89]

- 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.[90]

- 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.[91]

- 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.[92]

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[87] *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.

[88] *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").

[89] *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.

[90] *Adarand VII*. at 1170-72; *see DynaLantic, 885* F.Supp.2d 237.

[91] *Id.* at 1172-74; *see DynaLantic,* 885 F.Supp.2d 237.

[92] *Advanced VII*, 228 F.3d at 1174-75.

- MAP-21. In July 2012, Congress passed MAP-21 (see above), which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal DBE Program.[93] Congress also found 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.[94]

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.[95] If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.[96] The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."[97]

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.[98] It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.[99] In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."[100]

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."[101] "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

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

[94] Id. at § 1101(b)(1).

[95] See *AGC, SDC v. Caltrans,* 713 F.3rd at 1195; *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *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).

[96] *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[97] *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.

[98] *Id.; Western States Paving,* 407 F.3d at 990; *See also Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000).

[99] *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

[100] *Croson,* 488 U.S. at 500.

[101] *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *appeal pending; see, e.g.*, *AGC, SDC v. Caltrans,* 713 F.3rd at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver,* 36 F.3d 1513, 1522 (10th Cir. 1994).

locality or the locality's prime contractors."'[102] Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.[103]

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.[104] 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.[105] 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.[106]

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.[107] 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.[108] Conjecture and unsupported criticisms of the government's methodology are insufficient.[109] 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.[110]

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."'[111] It has been held that a state need not conclusively prove the existence of past or present racial discrimination to establish a

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[102] *Midwest Fence,* 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson,* 488 U.S. at 509).

[103] *Croson,* 488 U.S. at 509; *see, e.g.*, *AGC, SDC v. Caltrons*, 713 R.3d at 1196; *Midwest Fence,* 2015 WL 1396376 at *7, *appeal pending.*

[104] *Adarand Constructors, Inc. v. Pena,* ("*Adarand III*"), 515 U.S. 200 at 235 (1995); *see, e.g., Majeske v. City of Chicago,* 218 F.3d at 820.

[105] *Majeske*, 218 F.3d at 820; *see, e.g. Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 277-78; *Midwest Fence*, 2015 WL 1396376 *7.

[106] *Id.*; *Adarand VII,* 228 F.3d at 1166.

[107] *See e.g., H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at *7, *appeal pending.*

[108] *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 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

[109] *Id.*

[110] *H.B. Rowe*, 615 F.3d 233, at 242; *see Concrete Works,* 321 F.3d at 991.

[111] *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)).

strong basis in evidence for concluding that remedial action is necessary.[112] 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.[113] 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.[114]

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.[115] "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."[116]

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.[117] 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.[118] However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.[119]

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.[120] There is authority that measures of availability may be approached with different levels of

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[112] *H.B. Rowe Co.*, 615 F.3d at 241; *see e.g., Concrete Works*, 321 F.3d at 958.

[113] *Croson*, 488 U.S. 509, *see e.g., H.B. Rowe*, 615 F.3d at 241.

[114] *H.B. Rowe*, 615 F.3d at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); *see e.g., AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

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

[116] *Croson*, 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *See AGC, SDC v. Caltrans,* 713 F.3d at 1196-1197.

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

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

[119] *Western States Paving*, 407 F.3d at 1001.

[120] *See*, *e.g.*, *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

specificity and the practicality of various approaches must be considered,[121] "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."[122]

- Utilization analysis. Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to MBE/WBEs and DBEs.[123]

- Disparity index. An important component of statistical evidence is the "disparity index."[124] 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."[125]

- 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.[126]

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.[127] But personal accounts of actual discrimination may complement empirical evidence and play an important role in

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[121] *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 603 (3d Cir. 1996); *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1197, *quoting Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination … may vary.").

[122] *Id.*

[123] *See AGC, SDC v. Caltrans,* 713 F.3d at 1191-1197; *Eng'g Contractors Ass'n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

[124] *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).

[125] *See*, *e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans,* 713 F.3d at 1191; *H.B. Rowe Co.,* 615 F.3d 233, 243-244; *Rothe*, 545 F.3d at 1041; *Eng'g Contractors Ass'n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

[126] *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.

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

bolstering statistical evidence.[128] 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.[129]

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.[130]

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.[131]

b. The Narrow Tailoring Requirement.

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

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

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;

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

[129] *Concrete Works I*, 36 F.3d at 1520.

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

[131] *See*, *e.g.*, *AGC, SDC v. Caltrans,* 713 F.3d at 1197; *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; *Mountain West Holding,* 2014 WL 668734, *appeal pending*; *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 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.[132]

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular recipient's contracting and procurement market.[133] The narrow tailoring requirement has several components.

It should be pointed out that in the *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."[134] The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.[135] The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.[136] The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).[137] Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.[138]

The recent (August 19, 2015) Seventh Circuit Court of Appeals decision in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.[139] The court held the Illinois DOT DBE

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[132] *See*, *e.g.,* AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F3d 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).

[133] *Western States Paving*, 407 F3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

[134] 473 F.3d at 722.

[135] *Id.* at 722.

[136] *Id.* at 723-24.

[137] *Id.*

[138] *See, e.g., Midwest Fence,* 2015 WL 1396376 (N.D. Ill. 2015), *appeal pending; Geod Corp. v. New Jersey Transit Corp., et al.,* 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

[139] *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 2015 WL 4934560 at **18-22 (7th Cir. August 19, 2015).

Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.[140] The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.[141]

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.[142] Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.[143]

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity - conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.[144]

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts, which evaluated state DOT DBE Programs and their implementation of the Federal DBE Program, have held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.[145]

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."[146] Courts have found that "[w]hile

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[140] *Id.*

[141] *Id.*

[142] *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans,* 713 F.3d at 1197-1199.

[143] *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

[144] 407 F.3d at 996-1000; *See AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

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

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."[147]

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.'"[148]

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*[149] 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."[150] 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 DBEs and implementing the Federal DBE Program, 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.[151] And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and

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[146] *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).

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

[148] *Associated Gen. Contractors of Ohio, Inc. v. Drabik* ("Drabik II"), 214 F.3d 730, 738 (6th Cir. 2000).

[149] 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

[150] 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).

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

ethnicity-neutral alternatives to increase minority business participation in state and local contracting.[152]

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."[153]

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.[154] The courts have also found "the regulations require a state to 'meet the maximum feasible portion of [its] overall goal by using race neutral means.[155]

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;

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[152] *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.

[153] *Croson*, 488 U.S. at 509-510.

[154] 49 CFR § 26.51(a) requires recipients of federal funds to "meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation." *See*, *e.g.*, *Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the "Commission") issued its report entitled "Federal Procurement After *Adarand*" setting forth its findings pertaining to federal agencies' compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at http://www.usccr.gov. The Commission found that 10 years after the Court's *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

[155] *See*, *e.g.*, *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (*citing* 49 CFR § 26.51(a)).

- 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.[156]

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. 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.[157]

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT's DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.[158] The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded *Western States Paving* focused on whether the federal statute sufficiently considered race-neutral alternatives.[159] In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives."[160]

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.[161] For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;[162] (2) good faith efforts provisions;[163] (3) waiver provisions;[164] (4) a

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[156] *See* 49 CFR § 26.51(b); *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); *Eng'g Contractors Ass'n*, 122 F.3d at 927-29.

[157] *Western States Paving*, 407 F.3d at 993.

[158] *AGC, SDC v. Caltrans,* 713 F.3d at 1199.

[159] *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

[160] *AGC, SDC v. Caltrans*, 713 F.3d at 1199, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

[161] *Eng'g Contractors Ass'n*, 122 F.3d at 927.

[162] *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* ("AGC of Ca."), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

[163] *CAEP* I, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

rational basis for goals;[165] (5) graduation provisions;[166] (6) remedies only for groups for which there were findings of discrimination;[167] (7) sunset provisions;[168] and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.[169]

3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.[170] The Ninth Circuit and other 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.[171]

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.[172]

Intermediate scrutiny, as interpreted by the Ninth Circuit and other federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. 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

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[164] *CAEP* I, 6 F.3d at 1009; AGC of Ca., 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

[165] *Id.*

[166] *Id.*

[167] *AGC, SDC v. Caltrans,* 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

[168] *Peightal*, 26 F.3d at 1559.

[169] *Coral Constr.*, 941 F.2d at 925.

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

[171] *Id.*

[172] *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.[173]

The Eleventh Circuit has held that "[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort …. Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market."[174]

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 Montana DOT, include:

- *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003. (See Section D 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.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section E below.)

- *Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al., 2015 WL 4934560 (7th Cir. August 19, 2015)*, Petition for Writ of Certiorari submitted in January 2016 to the U.S. Supreme Court pending.

- *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration,* 2015 WL 3536271 (D.D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176. (See Section G below.)

This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact recipients of federal funds implementing the Federal DBE Program.

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.

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[173] *Coral Constr. Co.*, 941 F.2d at 931-932; *See Eng'g Contractors Ass'n*, 122 F.3d at 910.

[174] 122 F.3d at 929 (internal citations omitted.)

5. New Cases (at the time of this report)

Although not involving the Federal DBE Program, it is instructive to note the recent decision in *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 2015 WL 3536271 (D.D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176.

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*, 885 F.Supp.2d 237 (D.D.C. 2012). *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 the *DynaLantic*, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face. The court in *Rothe* agrees with the court's findings, holdings and reasoning in *DynaLantic*, and thus concludes that Section 8(a) is constitutional on its face.

The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government demonstrated a compelling interest for the racial classification, the need for remedial action is supported by strong and unrebutted evidence, and the Section 8(a) program is narrowly tailored.

Rothe has appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.

D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Ninth Circuit

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. Id., citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

> "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5% of contact dollars from Caltrans administered federally assisted contracts." *Id.* at 1191-1192.

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding

source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: "state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of

discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id. (*quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving,* 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

A. Application of strict scrutiny standard articulated in Western States Paving. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western*

States Paving. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving,* 407 F.3d at 997–99).

1. Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving,* 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." Id. (citing *Western States,* 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson,* 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination … may vary." *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in

Croson that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id. quoting Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 *quoting Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good 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.

2. Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the 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.*

B. Consideration of race–neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at

1199, citing *Grutter v. Bollinger,* 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

C. Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California. Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

D. Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. Id. at 1200. The Court then dismissed the appeal. Id.

2. *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D. Cal. Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011), appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013)

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination…", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion

Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id.* at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit

held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id.* (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000,

plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff's bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Id. at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." Id. at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. Id. However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. Id. The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. Id. at 992-93. The court accordingly rejected plaintiff's facial challenge. Id.

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. Id. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. Id. The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." Id. at 996; see also Br. for the United States at 28 (April 19, 2004) ("DOT's regulations … are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent

of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

4. *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. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of … Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found

that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

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

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, Plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

The State of Montana commissioned a disparity study, which was completed in in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the Montana DOT filed cross Motions for Summary Judgment.

Western States Paving Co. v. Washington DOT. The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Id.* at *2, *quoting Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2014 WL 6686734 at *2, *quoting Western States*, 407 F.3d at 998.

MDT study. The Montana DOT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The Court said that despite these findings, the consulting firm recommended that Montana DOT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that Montana DOT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the Court said Montana DOT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

Montana DOT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for Montana DOT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the Montana DOT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the Montana DOT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West,* at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at *4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at *3, *citing Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry.'" *Mountain West*, at *5, *quoting AGC, San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West*, at *5, *citing AGC, San Diego*, 713 F.3d at 1199.

The Court in *Mountain West,* following *AGC, San Diego,* concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West*, at *5, quoting *AGC, San Diego,* at 1200.

Statistical evidence. The Court held that Montana's DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. *Mountain West*, at *5. In addition,

the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id.* Also, the Court found that Mountain West could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana's transportation contracting industry. *Id.*

The Court noted that Mountain West merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at *6. The Court found that in mounting this attack on the study, Mountain West relied entirely on the expert report of Dr. George "Lanoue" (sic), and that Mountain West only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at *6. In addition, the Court found contrary to the allegation by Mountain West, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

Anecdotal evidence. The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network." *Id.* at *6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination." *Mountain West*, at *6, *quoting AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue's report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at *6. Contrary to Mountain West's assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state's DBE program must be supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana's transportation contracting industry. *Id.* at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that "substantial statistical disparities alone would give rise to an inference of discrimination, and certainly… statistical evidence combined with anecdotal evidence passes constitutional muster." *Mountain West* at *6, *quoting AGC, San Diego*, 713 F.3d at 1196.

Precipitous drop in utilization. The Court in *Mountain West* also found that neither Dr. LaNoue's report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana's transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that while the

study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen "dramatically" to 0.8 percent. *Id.* at *6. The Court held that this undisputed fact "strongly supports [Defendants'] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." *Mountain West*, at *6, *quoting Adarand Contractors, Inc. v. Slater,* 228 F.3d 1147, 1174 (10th Cir. 2000).

Conclusion and holding. In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana's transportation contracting industry. *Id.* at *7. The Court concluded that Montana's DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state's transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive "good ole boy network" within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana's DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana's transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana's DBE program during 2012-2014 when Montana and Montana DOT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West's claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and Montana DOT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.

6. *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 Montana DOT 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 Montana DOT.

Factual background and claims. Weeden was the low dollar bidder with a bid of $14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. Montana DOT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, Montana DOT established a DBE goal of 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. Montana DOT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the Montana DOT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against Montana DOT to prevent it from letting the contract to another bidder. Weeden claimed that Montana DOT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that Montana DOT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor Montana DOT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately $26 million, and that Montana DOT had $50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event Montana DOT awards the Project to another bidder. Id.

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that Montana DOT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 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 Montana DOT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, Montana DOT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, *citing Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that Montana DOT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion

to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for Montana DOT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied Plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

7. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182*. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182*.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183*.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id.* at 1183. The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

8. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them."

The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

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

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

The 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 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (*e.g.*,

inclusion of Aleuts). *Id.* at 714, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Id.* at 714, *citing Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

9. *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 five 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 interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to

operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available 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 than 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.

10. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in

light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of

discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a "propelling government interest" for King County's adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing* Croson, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such

topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than

strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's *(*"IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on

IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 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.*

2. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling

for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;

2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;

4. "Unbundling" large contracts; and

5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. Id. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." Id. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. Id. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. Id. at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." Id. at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). Id. at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, before it embarks on an affirmative action program … If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." Id. The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." Id. at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction." *Id.* at *16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms … registered and pre-qualified with IDOT." *Id.* The plaintiff also alleged the calculations of the DBE

utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id.* at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This … is [also] supported by the statistical data … which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

> That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables … [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.'

Id. at *21, *citing Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, Plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction … [A] state or local government need not

independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found "[s]ignificantly, Plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, *citing Adarand Constructors, Inc. v. Slater "Adarand VII"*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

3. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary

Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing* and *quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds $750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed $750,000.00 are excluded. 49 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.

4. *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004)

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads,* the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-

based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, citing 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.).

5. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

> by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals —

> simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

6. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

7. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

> [y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also* 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons,

including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

8. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the Plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the Plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the Plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in

this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State Defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the Plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State Defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, Plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of Plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, Plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, Plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non–DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, Plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, Plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, Plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court's evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a "statute's race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at *12, quoting *Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the Plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that Plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The Plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that Defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that Plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as

evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the Plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected Plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court that found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. Id. at *14, *quoting, Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that Plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already

rejected Plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that Plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that Plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, *quoting Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that Plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, Plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, Plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for Plaintiffs to prevail on this facial challenge, Plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that Plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that Plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by Plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects Plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as Plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that Plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that Plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to Plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored. Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id., quoting Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that Plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at *18, *quoting Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, Plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at *18, *quoting Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of

narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State Defendants' motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs' second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the Plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, Plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered Plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, Plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which Plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in Plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which Plaintiffs believe perform the same type of work as Plaintiff. *Id.* at *20. But, the Court found Plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because Plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by

MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State Defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that Plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the Defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' Defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the Plaintiffs.

***9. Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.*, 2015 WL 1396376 (N.D. Ill, March 24, 2015), appeal pending in U.S. Court of Appeals, Seventh Circuit, Docket No. 15-1827.**

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 N.H. (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

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

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

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

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

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

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

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

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at *14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for 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 (7th Cir. 2007). The court, *quoting Northern Contracting,* held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id. at *14.*

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

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

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

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

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a

regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at *19. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id at *19*. The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

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

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

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

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

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

Facial and as–applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at *20. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

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

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

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

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are

flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id. at *22*. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

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

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

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

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

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

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

Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

10. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213* (C.D. Ill. Feb 12, 2014), affirmed *Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al.*, 2015 WL 4934560 (7th Cir. August 19, 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 pass discrimination in the national construction market." *Id.* at *26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority. " *Id.* at *26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721. The

Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. " *Id.* at *26, *quoting Northern Contracting, Inc.,* 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting. Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*." *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The "no-waiver" policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to

good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need

not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below).

Notice of Appeal. Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision in August 2015. Dunnet Bay has submitted in January 2016 a Petition for Writ of Certiorari to the U.S. Supreme Court, which is pending.

11. *Geod Corporation v. New Jersey Transit Corporation, et. al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE program. 746 F. Supp 2d at 644. The Plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the Complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. Id. at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises

(SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. Id.

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id.* at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then "calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over $1 million in

comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying Northern Contracting v. Illinois. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in Northern Contracting, Inc. v. Illinois, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." Id. at 652 quoting Northern Contracting, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. Id. at 652, citing Northern Contracting, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." Id. at 652-653, quoting Northern Contracting, 473 F.3d at 722 and citing also Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964,

970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression

analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying Western States Paving. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id. at 656*, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id. at 656*. However, the court found that the Plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id. at 656*. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. Id. In addition, Plaintiff's

expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The Plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the Plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* 657.

12. *Geod Corporation v. New Jersey Transit Corporation, et. seq*. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated

that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, *citing Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, *citing Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, *citing* 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability,

which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

13. *South Florida Chapter of the Associated General Contractors v. Broward County*, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by Plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of Plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The Plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in Western States Paving and the Seventh Circuit approach in Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) and Northern Contracting, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in Western States Paving held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in Western States Paving to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in Western States Paving concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, citing Western States Paving, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside

of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. Id. In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in Northern Contracting, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, *quoting Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, *citing Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth

Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the Plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

14. *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.

F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions

Recent Decisions in Federal Circuit Courts of Appeal

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-

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

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

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." *Id.*, at footnote 1, *citing*, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to "establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses … [that] shall not be applied rigidly on specific contracts or projects." *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set "contract-specific goals or project-specific goals … for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of "minority" to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining "minority" as "only those racial or ethnicity classifications identified

by [the study] … that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department." *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

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

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

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

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

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

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. "Instead, a state may meet its burden by relying on "a significant statistical disparity" between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we "further require that such evidence be 'corroborated by significant anecdotal evidence of racial discrimination.'" *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must "introduce credible, particularized evidence to rebut" the state's showing of a strong basis in evidence for the

necessity for remedial action. *Id.* at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state's evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id.* at 242 (citations omitted). However, the Court stated "that mere speculation that the state's evidence is insufficient or methodologically flawed does not suffice to rebut a state's showing. *Id.* at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state's statutory scheme must also be "narrowly tailored" to serve the state's compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply "intermediate scrutiny" to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden "by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.*, *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review. *Id.* at 242. The Court found that its "sister circuits" provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure "can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race- or ethnicity-conscious program." *Id.* at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes "something less" than a 'strong basis in evidence,' the courts, … also agree that the party defending the statute must 'present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations." 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on "reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions." *Id.* at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff's burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff "has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance." Id. at 243, quoting West Virginia v. U.S. Department of Health & Human Services, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the "disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. Id. In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. Id. The closer the resulting index is to 100, the greater that group's participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, *quoting Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id.*, *citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period.

615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the

state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more 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 again African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

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

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

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

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

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7th Cir. 2006)

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the

Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

4. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community." *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

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

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the

selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

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

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

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

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

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

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious … policies must be limited in time." *Id.*, *citing Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and

because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

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

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

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996

Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

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

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

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492 (1989) (plurality opinion). Because "an effort to alleviate the effects of *societal* discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence" supports its conclusion that remedial action is necessary. *Id.* at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

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

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

burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

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

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

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

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

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

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage

availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

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

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

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

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

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements … also use your firm on public sector or private sector

projects without [MBE/WBE] goals or requirements?" Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. *Id.*

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

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

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

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

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

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

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

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson.* The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

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

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

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

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

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

The Court's rejection of CWC's arguments and the district court findings.

Use of marketplace data. The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. Id. at 974. The court found that the district court's conclusion was directly contrary to the holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant. Id., citing Adarand VII, 228 F.3d at 1166-67).

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

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

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

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII,* the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, *quoting Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

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

persistence of such discrimination … supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

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

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

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

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

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

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

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

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

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

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

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

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

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

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

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

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

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

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

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. Id. at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, *quoting Concrete Works II,* 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, *quoting Adarand VII,* 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. Id. at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II,* 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage. The district court had ruled that the City could not introduce the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

7. *Builders Ass'n of Greater Chicago v. County of Cook*, Chicago, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action …" and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting* in part *VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the "paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes." 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women's "set aside programs," the women's program the court determined must clear the same "hurdles" as the minority program." 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is "to be expected that there would be more soliciting of these contractors on public than on private projects." *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County "conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance." 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a "public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy." 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry "tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County." 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that "[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit … to be entitled to take remedial action." *Id.* But, the court found "of that there is no evidence either." *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found "puzzling" to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would "flunk the constitutional test" by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* "Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons." *Id.* The court, therefore, held that the ordinance was not "narrowly tailored" to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of "favored minorities" included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to "presume" discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—"that a comparison of the fraction of minority subcontractors on public and private projects

established discrimination against minorities by prime contractors on the latter type of project." 256 F.3d at 647-648.

8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts. The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

The court was mindful of the fact that it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

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

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

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over $25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id.* Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs;

3. Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program; and

4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." *Id.* The Eleventh Circuit further noted:

> "In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." *Id.*, *citing Croson*, 488 U.S. at 500). The requisite "'strong basis in evidence' cannot rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id.* at 907, *citing Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*)). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired … and the proportion of minorities willing and able to do the work … Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." *Id.* (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, "such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Id.* at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was

insufficiently probative to support the County's stated rationale for imposing a gender preference." *Id.* The district court's view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' … when the bidder percentages are used as the baseline." *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were "decidedly mixed" as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

> "[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent."

Id. at 914. "The utility of disparity indices or similar measures … has been recognized by a number of federal circuit courts." *Id.*

The Eleventh Circuit found that "[i]n general … disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination." *Id.* The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination." *Id.*, *citing* 29 CFR § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination." *Id.*, *citing Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." *Id.* The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." *Id.*

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." *Id.* at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

> "[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored."

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." *Id.*

The plaintiffs alleged that the disparities were "better explained by firm size than by discrimination … [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

> The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

> Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another." *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated." *Id.* at 919, n. 4 (internal citations omitted). "Under those circumstances," the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a "strong basis in evidence" of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County's subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

> Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor's release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did

not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, *quoting Croson*, 488 U.S. at 501, *quoting Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." Id. "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*" *Id.*, *quoting Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." *Id.*, *quoting Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms." *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

> Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was "shopped" to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a "letter of unavailability" for the MWBE owner to sign in order to obtain a waiver

> from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: "difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms." *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. *Id.* However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." *Id.*, *quoting Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id.*

Narrow tailoring. "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences … must only be a 'last resort' option." Id., quoting *Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and *citing Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard … forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id.* at 927, *citing Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical

structure." *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id.*

The Eleventh Circuit

> flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." Id., citing Croson, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") … Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an "equally conclusory analysis" in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the "institutional youth" of black- and Hispanic-owned construction firms. *Id.* "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

> [T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect … The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting Croson, 488 U.S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. "Most notably … the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." *Id.*

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. Id. However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. Id.

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

Recent District Court Decisions

11. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* ("*Rowe*"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT,

plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity

with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and

Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not,

NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587*, citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship

between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

12. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects

because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. Id. The VOP further imposes obligations on the City with respect to vendor contracts. Id. The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

13. *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.

14. *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 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection

factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id.* at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-

based affirmative action program must present "sufficient probative evidence" of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id.* Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id.* Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id.* Dr. Carvajal's results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id.*

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id.* (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished … it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact

conducted annual studies for several years. *Id.* The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known … Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional. " *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs … were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs $100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

15. *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.

16. *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).

17. *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.

18. *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act ("MBE Act"). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to

support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following Adarand VII, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment's Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. Id. The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a "passive participant" in a system of racial exclusion practiced by private businesses. Id. at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. Id.

The district court stated that a "mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice." *Id.* Rather, the court held that the "benchmark for judging the adequacy of a state's factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state's conclusion that remedial action was necessary." *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was "a passive participant" in private industry's discriminatory practices. *Id.* at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest "is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts." *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act's bid preference "is not based on past discrimination," rather, it is based on a desire to "encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole." *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not "compelling" in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it

cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors' evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify "a single qualified, minority-owned bidder who was excluded from a state contract." *Id.* The district court, thus, held that broad allegations of "systematic" exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the "State's admission here that the State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in Adarand VII identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the

Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the

eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of "numerical proportionality" between the MBE Act's aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act's 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is "not necessarily an absolute cap" on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer "substantial evidence" that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act's bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state's Central Purchasing Act with no time limitation. *Id.*

In terms of the "under- and over-inclusiveness" factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

19. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 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.

20. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a'ffd per curiam 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used

except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

> Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by

> minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, *citing Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, *quoting Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity …. *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

21. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. 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's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

This opinion underscored that governments must show four factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

22. *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.

G. Recent Decisions and Authorities Involving Federal Procurement that May Impact DBE and MBE/WBE Programs

1. *Rothe Development Corp. v. U.S. Department of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 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 disadvantages individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was

unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe,* 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. Id. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process

Clause of the Fifth Amendment. Id. at 782-83. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that

these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id.* at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id.* at 839, *quoting 61 Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were "stale," and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, *quoting Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;

2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and

3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as

enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the Dean v. City of Shreveport

case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, "[a] disparity ratio less than 0.80" — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — "indicates a relevant degree of disparity," and "might support an inference of discrimination." 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a "crucial question" in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this "touchstone" of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because "the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists." 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or "relative capacity," of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher

percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing* to *Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to "be clear," that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, "we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest." 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was 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.

2. *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 five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." DynaLantic*,* at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id. quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing Western States Paving v. Washington State DOT, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a

"passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative

unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to Plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the Plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face;

and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less

often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez,* the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an

alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with Plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the Plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay Plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

3. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 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.

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APPENDIX C.
Contract Data Collection

Keen Independent compiled data about MDT and local agency transportation contracts and the firms used as prime contractors and subcontractors on those contracts. Keen Independent sought sources of data that consistently included information about prime contractors and subcontractors on FHWA- and state-funded contracts, regardless of firm ownership or DBE status. The study team compiled data on construction, engineering and other transportation-related contracts. Data collection included contracts awarded by local agencies receiving funds through the Community Transportation Enhancement Program (CTEP).

Appendix C describes the study team's utilization data collection processes in six parts:

A. MDT contract and agreement data;
B. Community Transportation Enhancement Program (CTEP) contract data;
C. MDT bid and proposal data;
D. Characteristics of utilized firms and bidders;
E. MDT review; and
F. Data limitations.

A. MDT Contract and Agreement Data

Keen Independent collected data on transportation-related construction and engineering contracts that MDT awarded during the study period.

The study team examined:

- 606 MDT-awarded contracts totaling $1.7 billion from Construction;
- 214 Consultant Design contracts or task orders for $97 million; and
- 230 relevant contracts from Purchasing for $122 million.

MDT construction projects. Keen Independent collected data on transportation-related construction prime contracts and associated subcontracts that MDT awarded from October 2009 through September 2014. Throughout, the data collection focused on transportation-related contracts such as highway construction, road maintenance and related activities.

The primary information sources for construction contracts were MDT Construction Excel spreadsheets identifying dollars going to prime contractors and subcontractors for each project. MDT created these spreadsheets by running reports from its contract database (Site Manager) to provide information such as:

- Project and contract number;
- Description of work;
- Award date;
- Award amount;
- Amendment or change order amounts (when applicable);
- Location of work (i.e., district);
- Whether the contract included FHWA funding;
- Prime contractor name;
- Whether DBE goals were applied, and if so, level of goal; and
- For subcontractors, firm names, dollar amounts and type of work performed.

Engineering-related contracts. The study team also collected data on transportation-related engineering contracts. MDT administers consulting work through consultant contracts and "task orders." Keen Independent identified engineering-related contracts from the Consultant Design Excel spreadsheets provided by MDT's Consultant Design Bureau (CDB). CDB created a spreadsheet for consulting and other contracts that had activity (awards, amendments or task orders) during the October 2009 through September 2014 study period from its CIS database. Keen Independent reviewed these data to develop a refined list of contracts.

- MDT administered some on-call contracts during the study period. Consultants received work through task orders issued under those contracts. Keen Independent analysis focused on task orders issued during the study period. This included task orders executed during the study period for on-call contracts awarded prior to October 2009. Keen Independent treated each task order as a stand-alone contract element.

- When MDT augmented pre-October 2009 contracts through contract amendments, the dollar amounts for these amendments were included in the utilization analysis.

- Many engineering-related contracts in the utilization analysis were not on-call and were awarded within the October 2009 through September 2014 time period. In the utilization analysis, Keen Independent counted total dollars for these contracts including any contract amendments.

The final data for engineering contracts included the following information about the agreement or task order:

- Agreement number (and task order or amendment number);
- Description of work;
- Award date;
- Award amounts;
- Project location;
- Whether the contract involved federal funding;
- Prime consultant name and address; and
- For each subconsultant (if any), name, address, work type and dollar amount.

After collecting the necessary data about transportation-related engineering prime contracts and subcontracts, the study team created electronic prime contract and subcontract tables for use in the utilization and other analyses.

MDT Purchasing Services Section projects. The study team also collected information on transportation-related Purchasing contracts. MDT's Purchasing Services Section uses purchase orders for maintenance services. Keen Independent identified these contracts from a contracts database provided by MDT's Purchasing Services Section. Purchasing provided a spreadsheet that had activity (awards, amendments or task orders) during the October 2009 through September 2014 study period. Keen Independent worked with MDT to review and refine these data.

B. Community Transportation Enhancement Program (CTEP) Contract Data

CTEP activities are a subcomponent of the Surface Transportation Program (STP). During the study period, MDT elected to sub-allocate the enhancement funds to local governments for selection of local CTEP projects. MDT distributes funds to the eligible local governments based on population figures provided by the U.S. Bureau of the Census. MDT established the CTEP Section to administer these local agency contracts.

All CTEP projects received federal funding. There were no CTEP projects receiving only state funding. When federal funds are involved, USDOT requires local agencies to comply with federal requirements including implementation of the Federal DBE Program. In addition to any federal requirements, Montana state law governs local government public works contracting.

Local entities. There were 86 local entities that self-advertised, awarded and managed their own engineering and construction contracts awarded using CTEP money from MDT.

Data collection. MDT's CTEP Section provided a list of CTEP contracts with activity during the October 2009 through September 2014 study period. These CTEP data identified the local entity and provided a project description, prime contractor, project type, funding source and agreement date.

The CTEP data totaled 1,375 contracts totaling $39 million. After compiling the data available from MDT records and the local entities, Keen Independent reviewed project descriptions to ensure that the type of work involved was consistent with the transportation-related engineering and construction contracts examined in the study.

C. MDT Bid and Proposal Data

To complete case studies of MDT's contracting processes, Keen Independent also collected data on firms bidding and proposing on a sample of MDT construction contracts and engineering-related agreements.

- MDT provided bidder information for construction contracts, including maintenance contracts from the Purchasing Services Section, from October 2009 through September 2014.

- Keen Independent also collected information concerning proposers on a sample of MDT engineering-related contracts from October 2009 through September 2014.

D. Characteristics of Utilized Firms and Bidders

For each firm identified as working on an MDT or local agency contract, Keen Independent collected business characteristics including the race, ethnicity and gender of the business owner. Keen Independent collected similar information for a sample of bidders and proposers (including those not receiving work). Firm-level data includes company name, address, race/ethnicity and gender ownership, and whether the firm was DBE certified.

Keen Independent compiled company information from multiple sources. MDT and local agencies provided contact and other information on businesses that they utilized as prime contractors and subcontractors. The study team has obtained additional information about utilized firms from Dun & Bradstreet and other sources.

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 were owned by minorities or women (including race/ethnicity) and whether companies were DBE-certified include:

- Study team telephone interviews with firm owners and managers (attempted with each utilized firm with a contract over $5,000);
- Current and past MDT data on firms certified as DBEs;
- Other review of firm information (i.e., information about ownership on firm websites);
- Information from Dun & Bradstreet; and
- MDT staff review.

E. MDT Review

MDT reviewed Keen Independent contract data during several stages of the study process. The study team worked with MDT staff to review data collection, information the study team gathered, sample data for specific contracts and preliminary results.

MDT also reviewed the race, ethnicity and gender coding of firm ownership for utilized firms as Keen Independent prepared the utilization and disparity analyses.

F. Data Limitations

As discussed in Chapter 3, MDT contracting rules do not require prime contractors to formally subcontract for supplies and trucking; therefore, subcontracting data for supplies and trucking is limited. In addition, the information for CTEP contracts included in this Disparity Study was not as comprehensive as for MDT contracts. However, when compared with the overall contract data MDT does have, these limitations would not appear to have a meaningful effect on overall study results.

APPENDIX D.
General Approach to Availability Analysis

The study team used a custom census approach to analyze the dollar-weighted availability of minority- and women-owned business enterprises (MBE/WBEs) for MDT and local agency transportation-related construction and engineering prime contracts and subcontracts. Appendix D further explains the availability methodology and results and discussion presented in Chapter 6. Appendix D includes discussions of:

A. General approach to collecting detailed availability information;

B. Development of the interview instruments;

C. Execution of interviews; and

D. Additional considerations related to measuring availability.

Keen Independent provides the interview instrument at the end of this appendix.

A. General Approach to Collecting Detailed Availability Information

Keen Independent collected information from firms about their availability for MDT and local government contracts through telephone interviews and online surveys. Firms interested in MDT work could go directly to the online survey (or could request a fax or email survey), or they could complete an interview by telephone when contacted directly by the study team.

MDT conducted extensive outreach as part of the availability survey effort. Nearly 600 contractors and consultants with an email on file with MDT were directly sent information regarding the availability survey, including a link to the study page and the online survey. In addition, MDT contacted Economic Development Centers, Procurement Technical Centers, Montana Contractor's Association (MCA), American Council of Engineering Companies (ACEC) and the Montana State Director of Indian Affairs to encourage them to disseminate information about the availability interviews to their constituents. MDT included information about the availability phone interviews and online survey on its webpage and on Facebook.

Keen Independent developed a list of firms to be contacted by telephone from information about Montana firms compiled by Dun & Bradstreet (D&B). D&B's Hoover's affiliate maintains the largest commercially-available database of businesses in the United States. The availability analysis focused on companies in Montana performing types of work relevant to MDT and local agency transportation construction and engineering contracts.

Keen Independent determined the types of work involved in MDT contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period (see Chapter 3). D&B classifies types of work by 8-digit work specialization codes.[1] Figure D-1 on the

[1] D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

following page identifies the work specialization codes the study team determined were the most related to the study contract dollars.

Keen Independent obtained a list of firms from the D&B Hoover's database within relevant work codes that had locations within Montana. D&B provided phone numbers for these businesses. Keen Independent obtained 4,414 business listings from this source (this count includes a small number of duplicate records). The initial list of firms was large because it included popular subindustries, such as trucking or electrical work, in which only a small portion of firms is actually involved in highway-related work (one could not determine that prior to calling the company). Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, the data sources provided 4,095 unique listings for the availability interviews.

Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone interviews and other methods described below.

Telephone interviews. Keen Independent retained Customer Research International (CRI) to conduct telephone interviews with listed businesses. (CRI has extensive experience conducting these types of interviews from past Keen Independent disparity studies in other states.) After receiving the list described above, CRI used the following steps to complete telephone interviews with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the Montana Department of Transportation for purposes of expanding its list of companies interested in performing MDT transportation-related work.
- Some firms indicated in the phone calls that they did not work in the transportation contracting industry or had no interest in MDT work, so no further interview was necessary. (Such interviews were treated as complete at that point.)

Other avenues to complete an interview. Even if a company was not directly contacted by the study team, business owners could ask to complete an availability interview for their transportation contracting-related companies.

- Firm owners could also request that the questionnaire be faxed to them. Three firms returned completed questionnaires via fax.

- MDT sent an email describing the study and ways to participate to every firm with an email on file with the agency. These emails contained a link to the online survey (www.mdt.mt.gov/disparitystudy, a website maintained throughout the project). In addition, firms contacted through other means could request that a link to the online survey be emailed to them (75 firms did so).

Figure D-1.
D&B 8-digit codes for availability list source

Code	Description	Code	Description	Code	Description
07829902	Highway law and garden maintenance services	17910000	Structural steel erection	42139904	Heavy hauling, nec
07820207	Sodding contractor	17919900	Structural steel erection, nec	42139905	Heavy machinery transport
07829903	Landscape contractors	17810000	Water well drilling	42139903	Contract haulers
14420000	Construction sand and gravel	17919902	Concrete reinforcement, placing of	42139908	Liquid petroleum transport, non-local
14420201	Gravel mining	17919907	Precast concrete struct. frmg or panels, placing	49590102	Sweeping service: road, airport, parking lot, etc.
16110000	Highway and street construction	17940000	Excavation work	50320100	Paving materials
16110100	Highway signs and guardrails	17949901	Excavation and grading, building construction	50320101	Asphalt mixture
16110101	Guardrail construction, highways	17950000	Wrecking and demolition work	50320102	Paving mixtures
16110102	Highway and street sign installation	17959901	Concrete breaking for streets and highways	50320504	Concrete mixtures
16110200	Surfacing and paving	17959902	Demolition, buildings and other structures	50329901	Aggregate
16110201	Airport runway construction	17990900	Building site preparation	50329904	Cement
16110202	Concrete construction: roads, hwys, sidewalks	17990901	Boring for building construction	50329905	Gravel
16110203	Grading	17990903	Shoring and underpinning work	50329908	Stone, crushed or broken
16110204	Highway and street paving contractor	17999904	Building mover, including houses	50399912	Soil erosion control fabrics
16110205	Resurfacing contractor	17999906	Core drilling and cutting	50510209	Forms, concrete construction (steel)
16110206	Sidewalk construction	17999907	Dewatering	50630504	Signaling equipment, electrical
16110207	Gravel or dirt road construction	17999908	Diamond drilling and sawing	50990304	Reflective road markers
16119900	Highway and street construction, nec	17999912	Fence construction	52110502	Cement
16119901	General contractor, hwy and street construction	17999929	Sign installation and maintenance	52110506	Sand and gravel
16119902	Highway and street maintenance	29110501	Asphalt or asphaltic matls, made in refineries	73530000	Heavy construction equipment rental
16119903	Highway reflector installation	29110505	Road materials, bituminous	73539901	Cranes and aerial lift eqipment, rental or leasing
16220000	Bridge, tunnel, and elevated hwy construction	29110506	Road oils	73539902	Earth moving equipment, rental or leasing
16229900	Bridge, tunnel, and elevated highway, nec	29510000	Asphalt paving mixtures and blocks	73599912	Work zone traffic eqpt (flags, cones, barrels, etc.)
16229901	Bridge construction	29510200	Paving mixtures	73890200	Inspection and testing services
16229902	Highway construction, elevated	29510201	Asphalt/asphaltic pvng mixtures (not from ref.)	73890800	Mapmaking services
16229903	Tunnel construction	29510202	Coal tar paving materials (not from refineries)	73890801	Mapmaking or drafting, including aerial
16229904	Viaduct construction	29510203	Concrete, asphaltic (not from refineries)	73890802	Photogrammatic mapping
16239902	Manhole construction	29510204	Concrete, bituminous	73899909	Crane and aerial lift service
16239906	Underground utilities contractor	29510206	Road materials, bituminous (not from ref.)	73899921	Flagging service (traffic control)
16290400	Land preparation construction	32720000	Concrete products, nec	73899937	Pilot car escort service
16299901	Blasting contractor, except building demolition	32729903	Paving materials, prefabricated concrete	87110000	Engineering services
16299902	Earthmoving contractor	32729904	Prestressed concrete products	87110400	Construction and civil engineering
16299903	Land clearing contractor	32730000	Ready-mixed concrete	87110402	Civil engineering
16299904	Pile driving contractor	33120400	Structural and rail mill products	87110404	Structural engineering
16299906	Trenching contractor	33120405	Structural shapes and pilings, steel	87119903	Consulting engineer
17210300	Industrial painting	33120500	Bar, rod, and wire products	87130000	Surveying services
17210302	Bridge painting	34410200	Fabricated structural metal for bridges	87139900	Surveying services, nec
17210303	Pavement marking contractor	34410201	Bridge sections, prefabricated, highway	87139901	Photogrammetric engineering
17310000	Electrical work	34490100	Fabricated bar joists, concrete reinforcing bars	87139902	Aerial digital imaging
17319903	General electrical contractor	34490101	Bars, concrete reinforcing: fabricated steel	87310302	Environmental research
17319904	Lighting contractor	42120000	Local trucking, without storage	87349909	Soil analysis
17410100	Foundation and retaining wall construction	42120200	Liquid transfer services	87419902	Construction management
17410102	Retaining wall construction	42120201	Liquid haulage, local	87420402	Construction project management consultant
17710000	Concrete work	42120202	Petroleum haulage, local	87420410	Transportation consultant
17710200	Curb and sidewalk contractors	42129904	Draying, local: without storage	87480200	Urban planning and consulting services
17710201	Curb construction	42129905	Dump truck haulage	87480204	Traffic consultant
17710202	Sidewalk contractor	42129908	Heavy machinery transport, local	87489905	Environmental consultant
17710301	Blacktop (asphalt) work	42129912	Steel hauling, local	89990700	Earth science services
17719901	Concrete pumping	42130000	Trucking, except local	89990701	Geological consultant
17719902	Concrete repair	42139902	Building materials transport	89990702	Geophysical consultant
17719904	Foundation and footing contractor				

B. Development of the Interview Instruments

Keen Independent drafted an availability interview instrument; and MDT staff and the Technical Review Panel reviewed it before it was used for the online survey and telephone survey.

The final telephone interview instrument is presented at the end of this appendix.

Interview structure. The availability interview included nine sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the interview.

Areas of interview questions included:

- Identification of purpose. The interviews began by identifying MDT as the interview sponsor and describing the purpose of the study (i.e., "compiling a list of companies interested in working on road, highway and bridge projects").

- Verification of correct business name. CRI confirmed that the business reached was in fact the business sought out.

- Contact information. CRI then collected complete contact information for the establishment and the individual who completed the interview.

- Verification of work related to transportation-related projects. The interviewer asked whether the organization does work or provides materials related to construction, maintenance, or design on transportation-related projects (Question 1). Interviewers continued the interview with businesses that responded "yes" to that question.

- Verification of for-profit business status. The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question 2). Interviewers continued the interview with businesses that responded "yes" to that question.

- Identification of main lines of business. Businesses then chose from a list of work types that their firm performed in categories of construction-related work, engineering-related work, and supply activities. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question.

- Sole location or multiple locations. The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)

- Past bids or work with government agencies and private sector organizations. The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts.

- Qualifications and interest in future transportation work. The interviewer asked about businesses' qualifications and interest in future work with MDT and other government agencies in connection with both prime contracts and subcontracts.

- Geographic areas. Interviewees were asked whether they could do work in several geographic areas in Montana: Northwest, Southwest, North Central, East and South Central Montana.

- Largest contracts. The study team asked businesses to identify the value of the largest transportation-related contract or subcontract on which they had bid on or had been awarded in Montana during the past five years.

- Ownership. Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources such as DBE and MBE directories.

- Business background. The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.

- Potential barriers in the marketplace. Establishments were asked a series of questions concerning general insights about the marketplace and MDT contracting practices including obtaining loans, bonding and insurance. The interview also included an open-ended question regarding barriers or difficulties associated with starting or expanding a business or with obtaining work. In addition, the interview included a question asking whether interviewees would be willing to participate in a follow-up interview about marketplace conditions.

C. Execution of Interviews

Keen Independent held planning and training sessions with CRI as part of the launch of the availability interviews. CRI began conducting full availability interviews in August of 2015 and completed the interviews in September 2015.

To minimize non-response, CRI made at least five attempts at different times of day and on different days of the week to reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the interview.

Establishments that the study team successfully contacted. Figure D-2 presents the disposition of the businesses the study team attempted to contact for availability interviews from the D&B list.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning list of 4,095 businesses).

Figure D-2. Disposition of attempts to interview business establishments on D&B list

Note:

Study team made at least five attempts to complete an interview with each establishment.

Source:

Keen Independent from 2015 availability Interviews.

	Number of firms	Percent of business listings
Beginning list	**4,095**	100.0%
Less non-working phone numbers	364	8.9%
Less wrong number	16	0.4%
Firms with working phone numbers	**3,715**	**100.0** %
Less no answer	1,643	44.2
Less could not reach responsible staff member	114	3.1
Less unreturned fax/email	72	1.9
Firms successfully contacted	**1,886**	**50.8** %

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (364); or
- Wrong numbers for the desired businesses (16).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.

Working phone numbers. As shown in Figure D-2, there were 3,715 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- No answer. Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (1,643) establishments.
- Could not reach responsible staff member. For a small number of businesses (114), a responsible staff person could not be reached after repeated attempts.
- Unreturned fax/online. The study team sent faxes or emailed a link to the availability questionnaires upon request. There were 72 businesses that requested such surveys but did not return them. Only three firms returned completed fax surveys.

After taking those unsuccessful attempts into account, the study team was able to successfully contact by telephone 1,886 businesses, or 51 percent of those with working phone numbers.

Establishments included in the availability database. Figure D-3 presents the disposition of the 1,886 businesses the study team successfully contacted by telephone and how that number resulted in the 379 firms in the initial D&B list that completed interviews and the 435 businesses the study team ultimately included in the availability database after adding other companies completing online surveys.

Figure D-3. Disposition of successfully contacted businesses

Source:
Keen Independent from 2015 availability interviews.

	Number of firms
Firms successfully contacted	**1,886**
Less businesses not interested in discussing availability for MDT work	344
Less no longer in business	290
Less already completed online survey	6
Firms that completed interviews about business characteristics	**1,246**
Less no road and highway related work	715
Less not a for-profit business	111
Less duplicate responses	40
Qualified firms from D&B list	**380**
Plus other firms that completed online survey	**55**
Total firms included in availability database	**435**

Establishments not interested in discussing availability for MDT work. Of the 1,886 businesses that the study team successfully contacted, 344 were not interested in discussing their availability for MDT work. In Keen Independent's experience, these firms are often in subindustries that might be involved in transportation-related work where only a small portion of firms in that subindustry actually perform that work (e.g., electrical firms, trucking firms). The reason for this is that the types of work identified in Dun & Bradstreet's database are sometimes broad and do not isolate subsectors that specifically pertain to highway construction or engineering work (electrical work and trucking are examples). Many of those types of firms indicate that they are not interested in being on any MDT lists or answering any interview questions, which in most cases reflect the fact that they do not perform related work and should not be considered available for MDT transportation contracts.

Businesses included in the availability database. Many firms completing interviews were excluded from the final availability database because they indicated that they did not perform work related to transportation contracting or reported that they were not a for-profit business:

- Keen Independent excluded 715 businesses that indicated that indicated they were not involved in transportation contracting work.

- Of the completed interviews, 111 indicated that they were not a for-profit business (including non-profits, government agencies or homes). Interviews ended when respondents reported that their establishments were not a for-profit business.
- 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.

After those final screening steps, contacting the list of D&B firms produced a database of 380 businesses potentially available for MDT work. MDT outreach efforts to encourage firms to complete interviews produced 55 additional completed surveys from companies not on the D&B list.

D. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability, particularly as they related to MDT's implementation of the Federal DBE program.

Not providing a count of all businesses available for MDT work. The purpose of the availability interviews was to provide precise and representative estimates of the percentage of MBE/WBEs potentially available for MDT work. The availability analysis did not provide a comprehensive listing of every business that could be available for MDT work and should not be used in that way. Federal courts have approved the custom census approach to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.[2]

Not using MDT vendor 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.

A disadvantage with calculating availability based solely on presence of a firm on a list is that this method assumes that each firm is qualified and interested in each highway-related prime contract or subcontract regardless of factors such as type of work, location and size.

The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the interviews provide data on businesses' qualifications, relative bid capacity and interest in MDT work, which allowed the study team to take a more refined approach to measuring availability. Court cases involving state implementation of the Federal DBE Program have approved the use of a custom census approach to measuring availability.

Note that Keen Independent used DBE directories and other sources of information, including MDT review, to confirm information about the race, ethnicity and gender of business ownership that it obtained from

[2] Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, http://www.osdbu.dot.gov/dbeprogram/tips.cfm.

availability interviews. The study team re-contacted companies for clarification in the event of any inconsistencies in race, ethnicity and gender ownership information for the firm.

Using D&B lists. Dun & Bradstreet was a key source of business listings in Keen Independent's availability analysis. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Montana due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.

In addition, sometimes the primary type of work identified for a company is insufficiently precise to properly identify them as potentially available for transportation contracting work. For example, Keen Independent identified one firm in MDT's DBE Directory that was coded as "environmental consulting" in the Director but "business consulting" in the D&B data. As the study team did not include firms performing business consulting when developing the list for the availability telephone interviews, it was not contacted by CRI. (This firm was part of the large list of businesses receiving email notification of the survey, however.)

By comparing the headcount results for the detailed availability interviews with the results from the master bidders list the study team compiled, Keen Independent determined that there was no over- or under-representation of minority- and women-owned firms from using Dun & Bradstreet data, supplemented by other sources, in the detailed availability interviews. Chapter 5 shows the similarities in headcount results for the detailed availability interview and the master bidders list approaches.

Selection of specific subindustries. Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. However, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be interviewed, which leave some businesses off the contact list. For example, because cultural resource consulting comprised a very small portion of MDT transportation construction and engineering dollars, Keen Independent did not include this type of work in the list of companies for availability telephone interviews. (These firms, however, might still have learned of the availability interviews through other means and completed an online survey.)

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully interviewed are systematically different from those that were successfully interviewed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

Research sponsorship. Interviewers introduced themselves by identifying MDT as the interview sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability interviews than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all interviewed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete an interview is less important because the percentage of MBE/WBE availability is calculated within trucking before being combined with information from other work fields in a dollar-weighted fashion. In this example, work specialization would be a greater source of non-response bias if particular subsets of trucking firms were less likely than other subsets to be easily contacted by telephone.

Language barriers. There were no surveys that were not completed due to language barriers according to CRI records.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of interview responses in a number of ways. For example:

- Keen Independent reviewed data from the availability interviews with other vendor information that the study team collected from MDT. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses and was compared with interview responses concerning business ownership. MDT also reviewed the race, ethnicity and gender information compiled in the detailed availability interviews.
- Keen Independent compared interview responses about the largest contracts that businesses won during the past five years with actual MDT and local agency contract data.

A copy of the interview instrument for construction and engineering follows.

MDT Disparity Study —
Standard Availability Interview Instrument

Hello. My name is [*interviewer name*]. We are calling on behalf of the Montana Department of Transportation (MDT). This is not a sales call. MDT [pronounced "Em-dee-tee"] is compiling a list of companies interested in working on road, highway and bridge projects. This includes any construction, engineering and design, trucking and materials supply on highways, roads, bridges and related projects for state and local governments. This will take a maximum of 10-15 minutes of your time.

Who can I speak with to get the information we need from your firm?

[After reaching THE OWNER OR an appropriately senior staff member, the interviewer should re-introduce the purpose of the survey and begin with questions]

[IF NEEDED … We are contacting thousands of contractors, engineering firms, trucking companies, suppliers and other types of businesses in Montana.]

IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION … You can visit the study website at mdt.mt.gov/disparitystudy to learn more. And, you can call Megan Handl at MDT, (406) 444-6324.

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO MDT'S EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE DEPARTMENT]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

- ❑ Right company – SKIP TO 1
- ❑ Not right company
- ❑ Refuse to give information – TERMINATE

Y1. Can you give me any information about [firm name]?

- ❑ Yes, same owner doing business under a different name – SKIP TO Y4
- ❑ Yes, can give information about named company
- ❑ Company bought/sold/changed ownership – SKIP TO Y4
- ❑ No, does not have information – TERMINATE
- ❑ Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [firm name]? – SKIP TO Y5

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

- ❑ STREET ADDRESS _____
- ❑ CITY _____
- ❑ STATE _____
- ❑ ZIP _____

Y4. And what is the new name of the business that used to be [firm name]?

- ❑ (ENTER UPDATED NAME)

Y5. Can you give me the name of the owner or manager of the new business?

- ❑ (ENTER UPDATED NAME)

Y6. Can I have a telephone number for him/her?

- ❑ (ENTER UPDATED PHONE)

Y7. Can you give me the complete address or city for [new firm name]?

- ❑ STREET ADDRESS _____
- ❑ CITY _____
- ❑ STATE _____
- ❑ ZIP _____

Y8. Do you work for this new company?

- ❑ Yes
- ❑ No - TERMINATE

1. Does your firm do any work related to road, highway and bridge projects? This includes any construction, engineering and design, trucking and materials supply on highways, roads, bridges and related projects.

   ☐ Yes ☐ No

2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

   ☐ Yes ☐ No

IF YOU ANSWER NO TO QUESTION 1 OR 2, THE SURVEY IS COMPLETE.

IF YES TO QUESTIONS 1 AND 2, CONTINUE TO QUESTION 3.

IF INTERVIEWEE IS UNWILLING TO COMPLETE THE REMAINDER OF THE INTERVIEW VIA PHONE…

Z1. You also have the option to complete the survey online at https://www.surveymonkey.com/s/MDTdisparitystudysurvey. Can we send you a link?

☐ Yes ☐ No

If Yes, record email address:_____

Z2. **[Answer if 'No' to Z1. Otherwise skip to Q3.]** Would you be interested in completing the survey via fax?

☐ Yes ☐ No

If Yes, record fax number:_____

Type of Work

3. What types of work does your firm perform related to construction, maintenance or design of road, highway or bridge projects? Please indicate all that apply.

Construction-related

- ❑ Bridge and elevated highway construction
- ❑ Asphalt and concrete paving, including overlays
- ❑ General road construction and widening
- ❑ Excavation, site prep, grading and drainage
- ❑ Drilling and foundations
- ❑ Electrical work including lighting and signals
- ❑ Temporary traffic control
- ❑ Striping or pavement marking
- ❑ Installation of guardrails, fencing or signs
- ❑ Landscaping and related work including erosion control
- ❑ Concrete flatwork (including sidewalk, curb and gutter)
- ❑ Other concrete work
- ❑ Structural steel work
- ❑ Pavement surface treatment (such as sealing)
- ❑ Pavement milling
- ❑ Concrete cutting
- ❑ Trucking and hauling
- ❑ Wrecking and demolition
- ❑ Multi-use paths
- ❑ Underground utilities
- ❑ Other _____

Engineering-related

- ❑ Engineering
- ❑ Transportation planning
- ❑ Construction management
- ❑ Environmental consulting
- ❑ Inspection and testing
- ❑ Surveying and mapping
- ❑ Geotechnical engineering and consulting
- ❑ Cultural resource consulting
- ❑ Other _____

4. Does your firm sell: (Check all that apply.)

- ❑ Aggregate materials supply
- ❑ Asphalt, concrete or other paving materials
- ❑ Other _____

5. Please briefly describe the main line of business at your firm. In what industry would you classify the primary line of work at your firm?

_____

_____

6. Does your firm have offices in multiple locations?

☐ Yes ☐ No ☐ Don't know

7. Is your company a subsidiary or affiliate of another firm?

- ☐ Independent
- ☐ Subsidiary of another firm *Parent company name:* _____
- ❑ Affiliate of another firm *Affiliated company name:* _____
- ❑ Don't know

Role in Construction, Maintenance, Engineering or Other Work

The following questions pertain to your role in work related to transportation projects [For example: road, highway and bridge projects]

8. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in Montana? [Examples include MDT, cities or counties.]

   ☐ Yes ☐ No ☐ Don't know

9. **[Answer if 'Yes' to Q8. Otherwise skip to Q10.]** Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.

   ☐ Prime Contractor ☐ Trucker / Hauler

   ☐ Subcontractor ☐ Supplier

   ☐ Other_____

10. During the past five years, has your company worked on any part of a contract for a state or local government agency in Montana?

    ☐ Yes ☐ No ☐ Don't know

11. **[Answer if 'Yes' to Q10. Otherwise skip to Q12.]** Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.

    ☐ Prime Contractor ☐ Trucker / Hauler

    ☐ Subcontractor ☐ Supplier

    ☐ Other_____

12. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector project in Montana?

    ☐ Yes ☐ No ☐ Don't know

13. **[Answer if 'Yes' to Q12. Otherwise skip to Q14.]** Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.

    ☐ Prime Contractor ☐ Trucker / Hauler

    ☐ Subcontractor ☐ Supplier

    ☐ Other_____

14. During the past five years, has your company worked on any part of a contract for a private sector project in Montana?

    ☐ Yes ☐ No ☐ Don't know

15. **[Answer if 'Yes' to Q14. Otherwise skip to Q16]** Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.

☐ Prime Contractor ☐ Trucker / Hauler

☐ Subcontractor ☐ Supplier

☐ Other_____

16. Thinking about future transportation work, is your company qualified and interested in working with MDT as a prime contractor?

☐ Yes ☐ No ☐ Don't know

17. Thinking about future transportation-related work, is your company qualified and interested in working with cities, counties or other local agencies in Montana as a prime contractor?

☐ Yes ☐ No ☐ Don't know

18. Thinking about future transportation-related work, is your company qualified and interested in working with MDT as a subcontractor, trucker/hauler, or supplier?

☐ Yes ☐ No ☐ Don't know

19. Thinking about future transportation-related work, is your company qualified and interested in working with cities, counties or other local agencies in Montana as a subcontractor, trucker/hauler, or supplier?

☐ Yes ☐ No ☐ Don't know

Geographic Areas Your Company Serves in Montana

20. My next questions are about the geographic areas in Montana where your company can work.

20a. Can your company do work in the Northwestern Montana area, such as Whitefish, Kalispell, or Missoula?

☐ Yes ☐ No ☐ Don't know

20b. Southwestern Montana area, such as Butte, Bozeman, and Dillon?

☐ Yes ☐ No ☐ Don't know

20c. North Central Montana area, such as Helena, Great Falls and Havre?

☐ Yes ☐ No ☐ Don't know

20d. Eastern Montana area, such as Miles City, Glendive, Sidney and Wolf Point?

☐ Yes ☐ No ☐ Don't know

20e. South Central Montana area, such as Billings and Lewistown?

☐ Yes ☐ No ☐ Don't know

Contract History

24. In rough dollar terms, what was the largest road-, highway-, or bridge-related contract or subcontract your company was awarded in Montana during the past five years? Please include any government or private-sector contracts and any contracts not yet completed.

- ☐ Less than $100,000
- ☐ $100,000 up to $500,000
- ☐ $500,000 up to $1 million
- ☐ $1 million up to $2 million
- ☐ $2 million up to $5 million
- ☐ $5 million up to $10 million
- ☐ $10 million up to $20 million
- ☐ $20 million up to $40 million
- ☐ More than $40 million
- ☐ None
- ☐ Don't know

24. Was this the largest road-, highway-, or bridge-related contract or subcontract that your company bid on or submitted quotes for in Montana during the past five years?

☐ Yes ☐ No ☐ Don't know

25. **[Answer if 'No' in Q24.]** What was the largest road-, highway-, or bridge-related contract or subcontract that your company bid on or submitted quotes for in Montana during the past five years?

- ☐ $100,000 or less
- ☐ $100,000 up to $500,000
- ☐ $500,000 up to $1 million
- ☐ $1 million up to $2 million
- ☐ $2 million up to $5 million
- ☐ $5 million up to $10 million
- ☐ $10 million up to $20 million
- ☐ $20 million up to $40 million
- ☐ More than $40 million
- ☐ None
- ☐ Don't know

Ownership

26. 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?

☐ Yes ☐ No ☐ Don't know

27. 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?

[African-American (persons having origins in any of the Black racial groups of Africa)

Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

Hispanic American (persons of Spanish or Portuguese culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race)

Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)]

☐ Yes ☐ No ☐ Don't know

28. **[Answer if 'Yes" in Q27.]** Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

☐ African American
☐ Asian-Pacific American
☐ Subcontinent Asian American
☐ Hispanic American
☐ Native American
☐ Other: _____
☐ Don't know

Business Background

29. About what year was your firm established? _____

30. My next questions pertain to annual averages for your company for the past three years [OR JUST YEARS IN BUSINESS IF FORMED AFTER 2012]. Dun & Bradstreet indicates that your company has about [*number*] employees working out of just your location. Is that an accurate estimate of your company's average employees in the past three years?

[NOTE TO INTERVIEWER - INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION]

1=Yes – SKIP TO 32

2=No

98=(DON'T KNOW)

99=(REFUSED) – SKIP TO 32

31. About how many employees did you have working out of just your location, on average, over the past three years?

(RECORD NUMBER OF EMPLOYEES)

1=NUMERIC (1-999999999)

32. Think about the annual gross revenue of your company, considering just your location. Dun & Bradstreet information for that location indicates annual revenue of about [xxx]. Please estimate the annual average for the past three years (or for the years your company was in business if started after 2012).

- ☐ Up to $0.5 million
- ☐ $0.6 million to $1 million
- ☐ $1.1 million to $2.5 million
- ☐ $2.6 million to $5 million
- ☐ $5.1 million to $7.5 million
- ☐ $7.6 million to $10 million
- ☐ $10.1 million to $15 million
- ☐ $15.1 million to $24.0 million
- ☐ $24.1 million to $36.5 million
- ☐ $36.6 million or more
- ☐ Don't know

33. [IF "YES" TO 6] About how many employees did you have, on average, for all of your locations over the past three years?_____

34. [IF "YES" TO 6] Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past three years (or for the years your company was in business if started after 2012).

- ☐ Up to $0.5 million
- ☐ $0.6 million to $1 million
- ☐ $1.1 million to $2.5 million
- ☐ $2.6 million to $5 million
- ☐ $5.1 million to $7.5 million
- ☐ $7.6 million to $10 million
- ☐ $10.1 million to $15 million
- ☐ $15.1 million to $24.0 million
- ☐ $24.1 million to $36.5 million
- ☐ $36.6 million or more
- ☐ Don't know

Barriers or Difficulties

Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as you answer these questions.

35. Has your company experienced any difficulties in obtaining lines of credit or loans?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

36. Has your company obtained or tried to obtain a bond for a project?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

37. **[Answer if 'Yes' in Q36. Otherwise skip to Q38.]** Has your company had any difficulties obtaining bonds needed for a project?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

38. Have you had any difficulty in being prequalified for work in Montana?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

39. Have any insurance requirements on projects presented a barrier to bidding?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

40. Has the size of large projects presented a barrier to bidding?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

41. Has your company experienced any difficulties learning about bid opportunities with MDT?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

42. Has your company experienced any difficulties learning about bid opportunities with cities, counties and other local agencies in Montana?

    ☐ Yes ☐ No

    ☐ Don't know ☐ Does not apply

43. Has your company experienced any difficulties learning about bid opportunities in the private sector in Montana?

☐ Yes ☐ No

☐ Don't know ☐ Does not apply

44. Has your company experienced any difficulties learning about subcontracting opportunities in Montana?

☐ Yes ☐ No

☐ Don't know ☐ Does not apply

45. Has your company experienced any difficulties networking with prime contractors or customers?

☐ Yes ☐ No

☐ Don't know ☐ Does not apply

46. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

☐ Yes ☐ No

☐ Don't know ☐ Does not apply

47. Has your company experienced any difficulties receiving payment in a timely manner?

☐ Yes ☐ No

☐ Don't know ☐ Does not apply

48. We would like to get any other comments or suggestions you may have regarding barriers or difficulties your firm has experienced with starting or expanding your business or with obtaining work. Are there any other barriers or difficulties that we have not discussed that come to mind?

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

49. Would you be willing to participate in a follow-up interview about the local marketplace?

☐ Yes ☐ No

Interviewee and other Contact Information

50. Just a few last questions. What is your name at [*firm name* / *new firm name*]?

(RECORD FULL NAME)

_____

51. What is your position?

☐ Receptionist

☐ Owner

☐ Manager

☐ CFO

☐ CEO

☐ Assistant to Owner/CEO

☐ Sales manager

☐ Office manager

☐ President

☐ OTHER:_____

2. For purposes of receiving procurement information from MDT, is your mailing address [*firm address*]:

☐ Yes – SKIP TO 54

☐ No

☐ DON'T KNOW

53. What mailing address should MDT use to get any materials to you?

_____

_____

54. What fax number could MDT use to fax any materials to you?

_____

55. What e-mail address could MDT use to get any materials to you?

_____

55a. (RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)

End of survey message:

Thank you for your time. This is very helpful for MDT.

APPENDIX E.
Entry and Advancement in the Montana Construction and Engineering Industries

Federal courts have found that Congress "spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry."[1] Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Montana.

Potential barriers to business formation include barriers associated with entry and advancement in the construction and engineering industries. Appendix E examines recent data on education, employment, and workplace advancement that may ultimately influence business formation in the Montana construction and engineering industries.[2, 3]

Introduction

Keen Independent examined whether there were barriers to the formation of minority- and women-owned businesses in Montana. Business ownership often results from an individual entering an industry as an employee and then advancing within that industry. Within the entry and advancement process, there may be some barriers that limit opportunities for minorities and women. Figure E-1 presents a model of entry and advancement in the construction and engineering industries.

Appendix E uses 2000 Census data and 2008-2012 American Community Survey (ACS) data to analyze education, employment, and workplace advancement — all factors that may influence whether individuals start construction or engineering businesses. Keen Independent studied barriers to entry into construction and engineering separately, because entrance requirements and opportunities for advancement differ for those industries.

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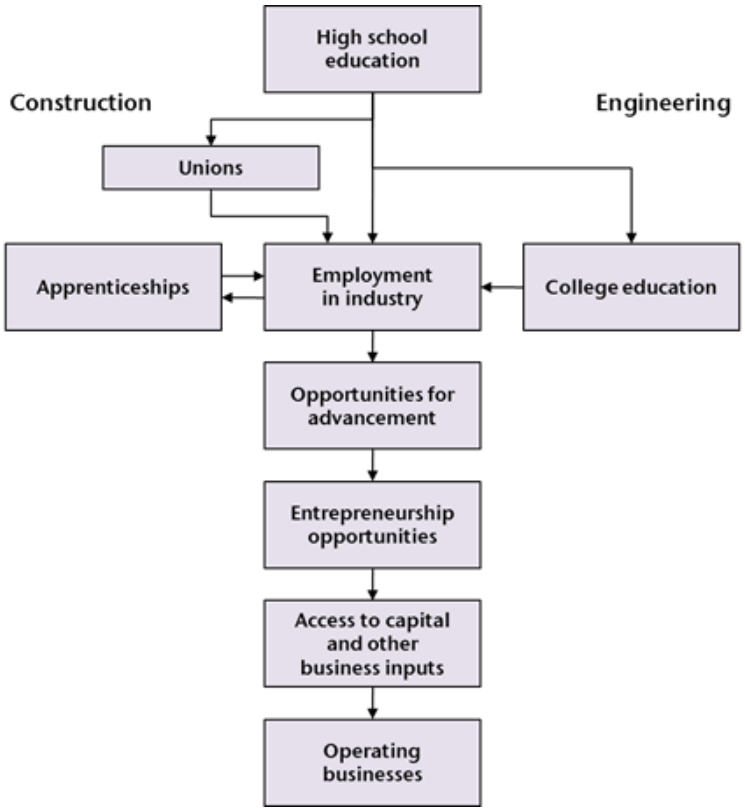
[1] *Sherbrooke Turf, Inc.*, 345 F.3d 964 (8th Cir. 2003) at 970 (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167 – 76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005) at 992.

[2] In Appendix E and other appendices that present information about local marketplace conditions, information for "engineering" refers to architectural, engineering and related services. Each reference to "engineering" work pertains to those types of services. In the 2000 Census industrial classification system, "Architectural, engineering and related services" was coded as 729. In the 2008-2012 ACS, the same industry was coded as 7290.

[3] Several other report appendices analyze other quantitative aspects of conditions in the Montana marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Figure E-1.
Model for studying entry into the construction and engineering industries

Source:
Keen Independent.



Representation of minorities among workers and business owners in Montana. Keen Independent began the analysis by examining the representation of racial and ethnic minorities among business owners and workers in Montana. Figure E-2 shows the demographic distribution of business owners in construction and engineering, business owners in other industries (excluding construction and engineering) and the Montana labor force, based on 2008-2012 ACS data. (Demographics of the construction and engineering workforce are presented separately later in Appendix E.) Analysis for Montana in 2008-2012 indicated the following:

- African Americans accounted for 0.1 percent of business owners in construction and engineering, 0.2 percent of business owners in other industries and 0.6 percent of all workers.
- Asian Americans accounted for 0.1 percent of business owners in construction and engineering compared to 0.5 percent of business owners in other industries (statistically significant difference) and 0.8 percent of all workers.
- Hispanic Americans accounted for 2.5 percent of business owners in construction and engineering compared to 1.3 percent of business owners in other industries (statistically significant difference) and 2.5 percent of all workers.
- Native Americans and other minorities accounted for 2.6 percent of all business owners in construction and engineering, 2.8 percent of owners in other industries and 6.3 percent of all workers.
- Non-Hispanic whites accounted for about 95 percent of business owners in both construction and engineering and in all other industries, and 90 percent of workers in all industries.

Representation of women among business owners and workers in Montana. Figure E-2 also examines the percentage of Montana business owners and workers who are women. In 2008-2012, women accounted for about 9 percent of business owners in construction and engineering, significantly less than their representation among business owners in other industries (40 percent). During this period, women comprised 47 percent of the Montana labor force.

Figure E-2.
Demographic distribution of business owners and the workforce in Montana, 2008-2012

Montana	Business owners in construction and engineering		Business owners in all other industries	Workforce in all industries
Race/ethnicity				
African American	0.1 %		0.2 %	0.6 %
Asian American	0.1	**	0.5	0.8
Hispanic American	2.5	*	1.3	2.5
Native American or other minority	2.6		2.8	6.3
Total minority	5.3 %		4.8 %	10.2 %
Non-Hispanic white	94.7		95.2	89.8
Total	100.0 %		100.0 %	100.0 %
Gender				
Female	9.3 %	**	39.5 %	47.2 %
Male	90.7	**	60.5	52.8
Total	100.0 %		100.0 %	100.0 %

Note: *,** Denote that the difference in proportions between business owners in construction and engineering and business owners in all other industries for the given race/ethnicity/gender group is statistically significant at the 90% or 95% confidence level, respectively. The engineering industry includes "architectural, engineering and related services."

Source: Keen Independent Research from 2008-2012 ACS Public Use Microdata Sample (PUMS). The 2008-2012 raw data extracts were obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Construction Industry

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that individuals of different races, ethnicities and genders own in the Montana construction industry.

Education. Formal education beyond high school is not a prerequisite for most construction jobs. For that reason, the construction industry has traditionally attracted individuals who have relatively less formal education than in other industries. Based on 2008-2012 ACS data, 41 percent of construction workers in Montana were high school graduates without post-secondary education and 10 percent had not graduated high school. Only 13 percent of construction workers had a four-year college degree, less than the one-third of all workers in the state.

Race/ethnicity. Entry level jobs in construction have lower educational requirements than many industries. Because relatively fewer Hispanic Americans and Native Americans in Montana have pursued education beyond high school, one would expect a relatively high representation of those groups in the Montana construction industry, especially in entry-level positions.

- Hispanic Americans represented a large population of Montana workers without post-secondary education. In 2008-2012, 21 percent of all Hispanic American workers 25 and older who worked in Montana held at least a four-year college degree, substantially less than the figure for non-Hispanic whites (34%).

- The percentage of Native American workers in Montana with a four-year college degree (17%) was one-half that of non-Hispanic whites in 2008-2012.

- As discussed later in this appendix, educational achievement of African Americans and Asian Americans in Montana is similar to non-Hispanic whites.

Gender. A higher percentage of female than male workers in Montana ages 25 years and older have a four-year college degree (36% compared with 31%).

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.[4] In response to limited construction employment opportunities during the Great Recession, apprenticeship programs have limited the number of new apprenticeships[5] as well as access to knowing when and where apprenticeships are occurring.[6] Apprenticeship programs often refer to an "out-of-work list" when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, apprentices in highway construction are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.[7]

Employment. With educational attainment for minorities and women as context, Keen Independent examined employment in the Montana construction industry. Figure E-3 presents data for the

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[4] Bureau of Labor Statistics, U.S. Department of Labor. (2013, Summer). "Apprenticeship: Earn while you learn." *Occupational Outlook Quarterly*, 3-5.

[5] Kelly, Maura, Wilkinson, Lindsey, Pisciotta, Maura and Larry S. Williams. 2015. "When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades." *Eastern Sociological Society*. 30(2): 415-438.

[6] Goss Graves; Fatima, Chaudhry, Neena; Khouri, Lauren; Frohlich, Lauren; Lane, Abby; Rao, Devi and Valerie Hogan. 2014. "Women in Construction: Still Breaking Ground." National Women's Law Center.

[7] Ibid.

Montana construction industry and for the Montana workforce as a whole from the 2000 Census and 2008-2012 American Community Survey.

Race/ethnicity. About 9 percent of people working in the Montana construction industry were minorities in both 2000 and 2008-2012, as shown in the first two columns of Figure E-3.

- In 2008-2012, Native Americans (6%) and Hispanic Americans (2%) represented the largest minority groups working in construction. As shown in the right-hand columns of Figure E-3, representation of Native Americans and Hispanic Americans in construction closely matches the representation of these groups in all other industries combined (6% for Native Americans and 2% for Hispanic Americans).

- African Americans and Asian Americans combined were less than 1 percent of Montana construction employment. Although the number of African Americans among the total Montana workforce is very small, there is some indication that African Americans were underrepresented in the Montana construction industry based on 2000 Census data (statistically significant difference between share of employment in construction industry and all other industries combined).

Gender. There are large differences in the representation of women in construction compared with women in all industries. For 2008-2012, women represented 8 percent of all construction workers and 51 percent of workers in all other industries in Montana (47 percent of the overall workforce).

Figure E-3.
Demographics of workers in construction and all other industries in Montana, 2000 and 2008-2012

	Construction		All other industries	
Montana	**2008-2012**	**2000**	**2008-2012**	**2000**
Race/ethnicity				
African American	0.4 %	0.1 % **	0.6 %	0.4 %
Asian American	0.4	0.6	0.8	0.7
Hispanic American	2.5	2.1	2.5	1.6
Native American or other minority	5.8	6.6	6.4	5.6
Total minority	9.1 %	9.4 %	10.3 %	8.3 %
Non-Hispanic white	90.9	90.6	89.7	91.7
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Female	8.3 % **	9.5 % **	50.8 %	49.6 %
Male	91.7 **	90.5 **	49.2	50.4
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: *,** Denote that the difference in proportions between workers in the construction industry and all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

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

Academic research concerning any effect of race- and gender-based discrimination. There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.[8] 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.[9] More recently, Kelly et al. found that white men were the least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.[10]

Multiple studies report that race and gender inequalities are visible in a workplace often evidenced through the acceptance of the "good old boys' club" culture.[11] There may also be an attachment to the idea that "working hard" will bring success. However, the quantitative and qualitative evidence indicates that "hard work" alone does not ensure success for women and people of color.[12] In 2014, the National Women's Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including experiencing outright gender discrimination and harassment.[13]

Research has well documented the idea that managers often hire individuals who are similar to themselves which creates a culture of similarity[14] or homologous reproduction.[15] In the construction industry, Kelly et al. found that women and people of color had a more difficult time establishing personal relationships and building professional networks with their white male journeyman, supervisors and foremen in the highway trades. In Oregon, 35 percent of women of color, 32 percent of white women and 21 percent of men of color reported problems with journey workers, compared to only 13 percent of white men.[16]

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[8] 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.

[9] 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.

[10] Kelly, Maura, Wilkinson, Lindsey, Pisciotta, Maura and Larry S. Williams. 2015. "When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades." Eastern Sociological Society. 30(2): 415-438.

[11] *Ibid;* Lapchick, Richard E. 2014. "Numbers Unacceptable For Women in Decision-Making Roles." Sports Business Journal. September 15, 2014: 13. Retrieved August 17, 2015, from http://societyofwomenengineers.swe.org/trends-stats/3294-education. Kanter, Rosabeth Moss. 1977. *Men and Women of the Corporation*. New York: Basic Books.

[12] Kelly, Maura, Wilkinson, Lindsey, Pisciotta, Maura and Larry S. Williams. 2015. "When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades." *Eastern Sociological Society*. 30(2): 415-438.

[13] National Women's Law Center, 2014. "Women in Construction: Still Breaking Ground."

[14] Doherty, Alison and Packianathan Chelladurai. 1999. "Managing Cultural Diversity in Sport Organizations: A Theoretical Perspective." *Journal of Sport Management*; 19(3): 280-297.

[15] Kanter, Rosabeth Moss. 1977. *Men and Women of the Corporation*. New York: Basic Books.

[16] Kelly, Maura, Wilkinson, Lindsey, Pisciotta, Maura and Larry S. Williams. 2015. "When Working Hard Is Not Enough For Female and Racial/Ethnic Minority Apprentices in Highway Trades." *Eastern Sociological Society*. 30(2): 415-438.

Kelly et al. also identified an underrepresentation of minorities and women in apprenticeship programs.[17] Their research found informal hiring practices that relied on personal relationships and networking. While 76 percent of white men in the study agreed that jobs were fairly assigned during their most recent apprenticeship, only 57 percent of women of color, 58 percent of white women, and 55 percent of men of color agreed. In addition, both construction company staff and apprentices indicated that they believed that women and men of color were more likely to be laid off even if there were other apprentices who were newer to the project or were less effective.

In addition, Burd-Sharps et al. found that almost 68 percent of female apprentices in Oregon's highway trades experienced workplace discrimination or harassment in comparison to 28 percent of men, and women of color reported more discrimination than white female apprentices (66 and 52, respectively).[18]

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.[19] The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.[20] Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering into the industry.[21]

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 has historically prevented minorities from obtaining employment in skilled trades.[22] Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

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[17] Hegewisch, Ariane, Henrici, Jane; Shaw, Elyse, and Thomas Hooper. 2014. Untapped Resources, Untapped Labor Pool: Using Federal Highway Funds to Prepare women for Careers in Construction.

[18] Burd-Sharps, Sarah, Lewis, Kristen, and Maura Kelly. 2014. "Building a More Diverse Skilled Workforce in the Highway Trades: Are Oregon's Current Efforts Working?" Final report submitted to the Oregon Bureau of Labor and Industries and Oregon Department of Transportation. October 2014.

[19] Applebaum, Herbert. 1999. Construction Workers, U.S.A. Westport: Greenwood Press.

[20] Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

[21] Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." Social Problems. 41(4): 562-584.

[22] U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042.

- 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.[23]
- 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.[24]
- 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.[25]
- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.[26]
- 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.[27]
- 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.[28]

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

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[23] 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).

[24] Applebaum. 1999. Construction Workers, U.S.A.

[25] 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.

[26] Waldinger and Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction."

[27] 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).

[28] Feagin and Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41 (4): 562-584.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had "much higher enrollments and participation of women and ethnic/racial minorities" and exhibited "markedly better performance for all groups on rates of attrition and completion" compared to employer-run programs.[29]
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.[30]
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.[31] 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 research focusing on specific states also indicates a more productive relationship between unions and minority workers than that which may have prevailed in the past. A study by Berik, Bilginsoy and Williams found minority and white women were overrepresented in union apprenticeship programs in Oregon. Although white women and minorities were less likely to graduate compared to white men, graduation rates for those groups in the union apprenticeship programs were higher than for nonunion programs.[32] Similar research conducted over a ten-year period in Massachusetts found women and minorities were recruited at a higher rate for union apprenticeship programs compared to nonunion programs and that the completion rates for these groups in union programs were consistently higher than those of nonunion programs.[33]

Recent union membership data support those findings as well. For example, 2012 Current Population Survey (CPS) data indicate that union membership rates for African Americans is slightly higher than for non-Hispanic whites and union membership rates for Hispanic Americans are similar to those of non-Hispanic whites.[34] The CPS asked participants, "Are you a member of a labor union or of an employee association similar to a union?" CPS data showed union membership to be 13 percent for African American workers, 10 percent for Hispanic American workers and 11 percent for non-Hispanic white workers. In the construction industry, the union membership rates for both

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[29] Glover, Robert and Bilginsoy, Cihan. 2005. "Registered Apprenticeship Training in the U.S. Construction Industry." *Education & Training,* Vol. 47, 4/5, p 337.

[30] Günseli Berik, Cihan Bilginsoy. 2006. "Still a wedge in the door: women training for the construction trades in the USA." *International Journal of Manpower*, Vol. 27 Iss: 4, pp.321 – 341.

[31] Bilginsoy, Cihan. 2005. "How Unions Affect Minority Representation in Building Trades Apprenticeship Programs." *Journal of Labor Research, 57(1).*

[32] Berik, Bilginsoy, and Williams. 2011. "Gender and Racial Training Gaps in Oregon Apprenticeship Programs." *Labor Studies Journal:* 36(2): 221-244.

[33] Argyres, Anneta and Moir, Susan. 2008. "Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997-2007." *Labor Resource Center Publications.* Paper 2.

[34] 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

African American workers and non-Hispanic white workers is 17 percent but the rate for Hispanic American construction workers is only 8 percent.

Although union membership and union program participation varies based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Montana 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. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through "insourcing."[35]

Keen Independent researched union membership in Montana and found that, in 2014, 13 percent of all employed wage and salary workers were members of a labor union or an employee association similar to a union (membership was about 14 percent of employed people in 2009). However, union membership among private sector construction workers in Montana was just 7 percent in 2014, indicating a substantial decrease from levels in 2009 (14%).[36] Nationally, about 14 percent of private construction workers are union members.[37]

Advancement. To research opportunities for advancement in the Montana construction industry, Keen Independent examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.[38] Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2000 Census and 2008-2012 ACS for analysis.

Minority representation in construction occupations. Figures E-4 and E-5 present the representation of minorities in select construction-related occupations in Montana, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians) and supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-4 and E-5 present those data for 2000 and 2008-2012, respectively, based on 2000 Census and 2008-2012 ACS data.

Overall, minorities comprised 9 percent of construction workers in 2000, as shown on the top of Figure E-4. Except for laborers (15% of whom were minority), minority representation in 2000 did not vary substantially between the trades presented in Figure E-4.

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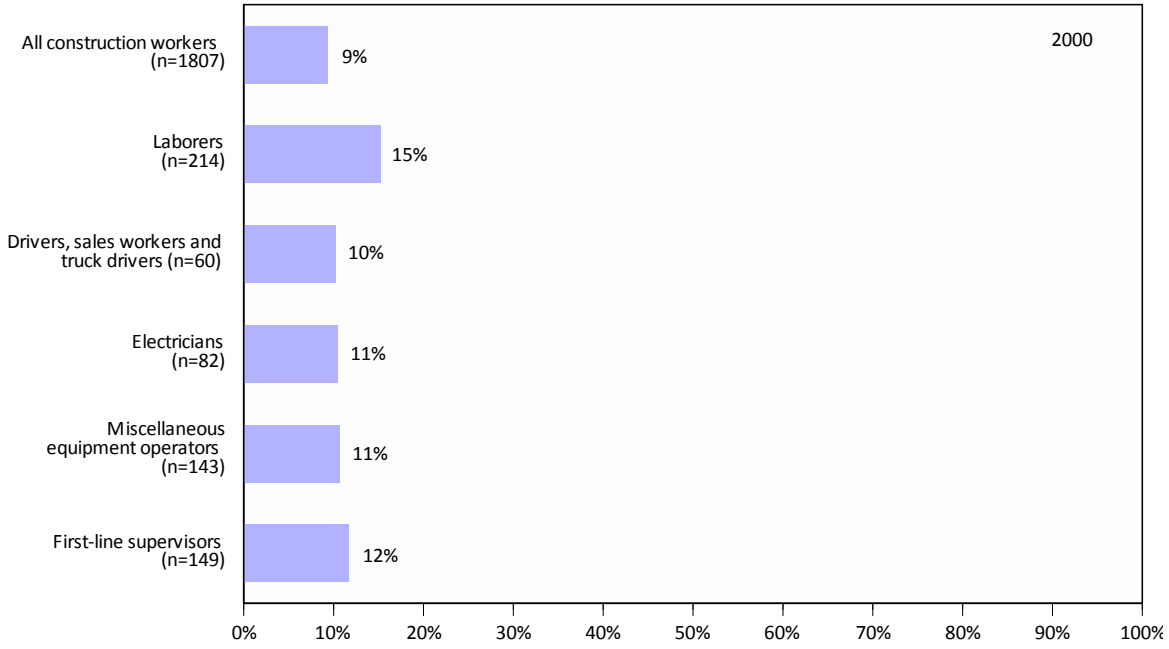
[35] Judd, Ron. 2015. "Seattle's Building Boom is Good News for a New Generation of Workers." *The Seattle Times, Pacific NW Magazine.* 6/25/2015. http://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-for-a-new-generation-of-workers/.

[36] Barry Hirsch and David Macpherson. 2015. "Union Membership and Coverage Database from the CPS." Retrieved October 18, 2015, from http://unionstats.com.

[37] Hirsch, Barry T. and David A. Macpherson. 2003. "Union Membership and Coverage Database From the Current Population Survey: Note." *Industrial and Labor Relations Review.* 56(2):349-354. Hirsch, Barry T. and David A. Macpherson. 2014. *U.S. Historical Tables:* Union Membership, Coverage, Density, and Employment: Private Construction, 1973-2014. Retrieved October 18, 2015, from http://www.unionstats.com. Hirsch, Barry T. and David A. Macpherson. 2014. *State:* Union Membership, Coverage, Density, and Employment: Private Construction, 1973-2014. Retrieved October 18, 2015, from http://www.unionstats.com.

[38] Bureau of Labor Statistics, U.S. Department of Labor. 2007. "Standard Occupational Classification Major Groups." Retrieved February 15, 2007, from http://www.bls.gov/soc/major_groups.htm.

Figure E-4.
Minorities as a percentage of selected construction occupations in Montana, 2000

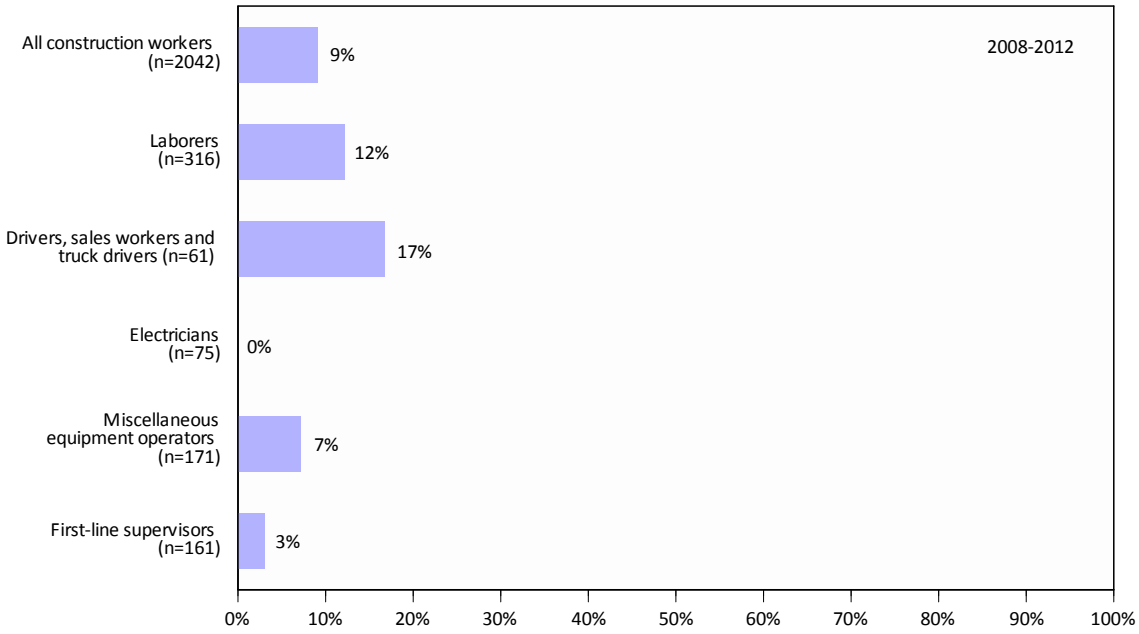


Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous equipment operators.

Source: Keen Independent Research from 2000 U.S. Census 5% sample Public Use Microdata samples. The 2000 Census raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

As shown in Figure E-5, ACS data for 2008 through 2012 indicate more variation in the relative employment of minorities in specific Montana construction trades. There were no minorities in the sample data for electricians for those years and only 3 percent of first-line supervisors were minorities compared with 9 percent of all workers in construction.

Figure E-5.
Minorities as a percentage of selected construction occupations in Montana, 2008-2012



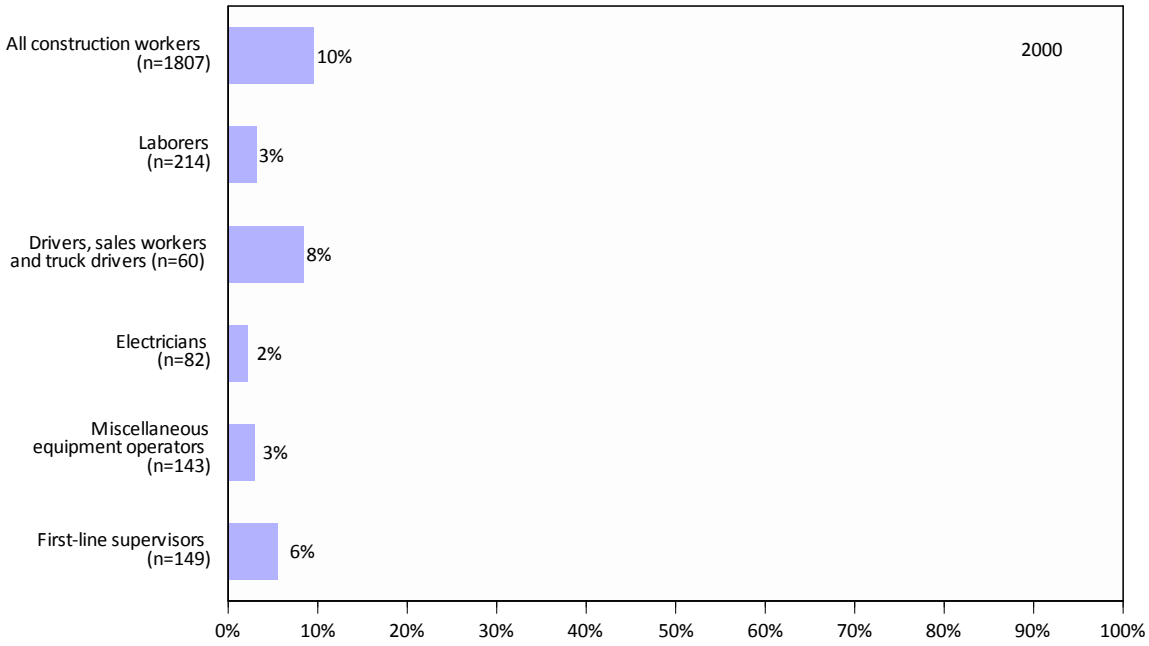
Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous equipment operators.

Source: Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Representation of women in construction occupations. Keen Independent also analyzed the proportion of women in construction-related occupations. Figures E-6 and E-7 summarize results for 2000 and 2008-2012, respectively.

In 2000, women were 10 percent of workers in construction, but comprised a small share of laborers (3%), electricians (2%) and equipment operators (3%). Only 6 percent of first-line supervisors were women.

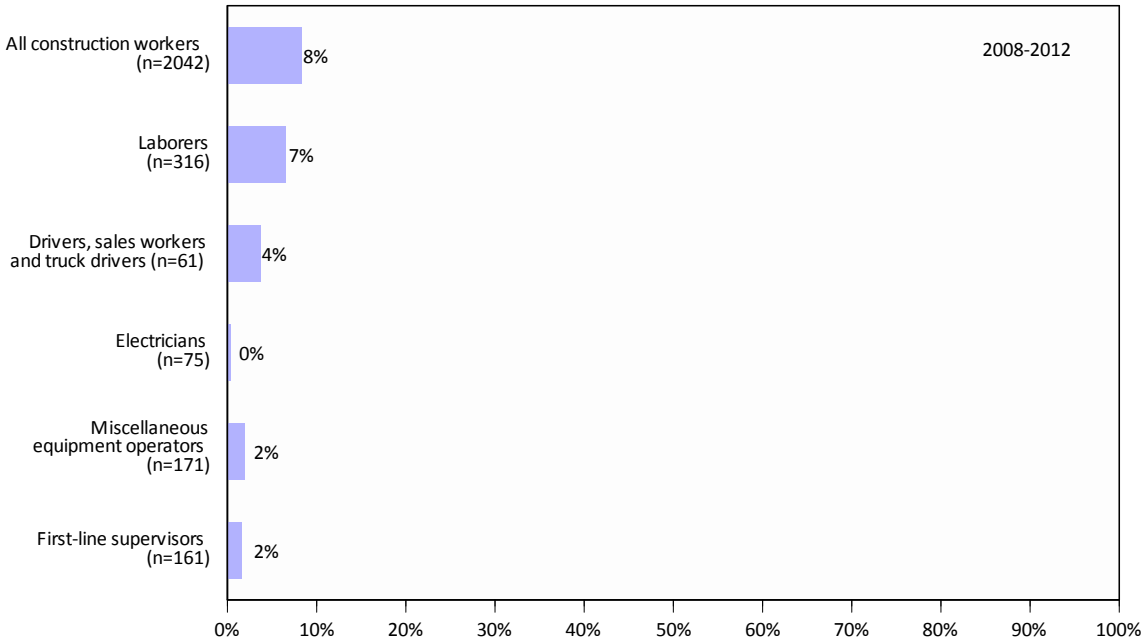
Figure E-6.
Women as a percentage of construction workers in selected occupations in Montana, 2000



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous equipment operators.
Source: Keen Independent Research from 2000 U.S. Census 5% sample Public Use Microdata samples. The 2000 Census raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

As shown in Figure E-7, none of the electricians in the 2008-2012 ACS sample data for Montana were women and just 2 percent of equipment operators and 2 percent of first-line supervisors were women.

Figure E-7.
Women as a percentage of construction workers in selected occupations in Montana, 2008-2012



Note: Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators were combined into the single category of miscellaneous equipment operators.

Source: Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 ACS 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 Montana construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-8 presents the percentage of construction employees who reported working as managers in 2000 and 2008-2012, by racial, ethnic and gender group.

In 2008-2012, 8 percent of non-Hispanic whites in the Montana construction industry were managers compared with about 4 percent of minorities working in the industry. In other words, non-minorities working in the industry were about twice as likely to be managers as minorities employed in the industry. In 2000, the difference was larger: 7 percent of non-minority construction employees worked as managers compared with 2.4 percent of minorities working in the industry. The difference in 2000 was statistically significant.

Figure E-8 also compares the percentage of women and men working in the Montana construction industry who were managers. These differences were smaller than shown for minorities and were not statistically significant.

Figure E-8.
Percentage of construction workers in Montana who worked as a manager, 2000 and 2008-2012

Montana	2008-2012	2000
Race/ethnicity		
Minority	4.3 %	2.4 % **
Non-Hispanic white	8.1	7.0
Gender		
Female	5.6 %	5.1 %
Male	8.5	6.7
All individuals	7.8 %	6.5 %

Note: *,** Denote that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

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

Engineering Industry

Keen Independent also examined how education and employment may influence the number of potential minority and female entrepreneurs working in the Montana engineering industry.

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the engineering industry. Many occupations require at least a four-year college degree and some require licensure. According to the 2008-2012 ACS, 69 percent of individuals working in the Montana engineering industry had at least a four-year college degree. Focusing on civil engineering, nearly all individuals in the ACS data who reported that they were civil engineers had at least a four-year college degree.

Therefore, any barriers to obtaining a college education can restrict employment, advancement and business ownership opportunities in the engineering industry. Any disparities in business ownership rates in engineering-related work may in part reflect the lack of higher education for particular racial, ethnic and gender groups.[39] Keen Independent explores this issue below.

Race/ethnicity. Figure E-9 presents the percentage of Montana workers age 25 and older with at least a four-year college degree. About 34 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2008-2012. This percentage was lower for Native Americans (17%) and Hispanic Americans (21%). Therefore, the level of education necessary to work in the engineering industry may affect employment opportunities for these two groups.

Gender. In 2008-2012, the proportion of women in Montana with at least a four-year college degree surpassed that of men (see Figure E-9).

[39] Feagin, Joe R. and Nikitah Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 42 (4): 562-584. Macionis, John J. 2014. *Sociology, Fifteenth Edition*. Saddle River, NJ: Pearson.

Figure E-9.
Percentage of all workers 25 and older in Montana, with at least a four-year degree, 2000 and 2008-2012

Montana	2008-2012		2000	
Race/ethnicity				
African American	32.0 %		26.7 %	
Asian American	38.7		39.0	*
Hispanic American	20.9	**	17.2	**
Native American	17.2	**	12.6	**
Non-Hispanic white	34.3 %		29.8 %	
Gender				
Female	35.7 %	**	28.9 %	
Male	30.6		28.7	
All workers	33.0 %		28.8 %	

Note: *,** Denote 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 90% or 95% confidence level, respectively.

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

Additional indices of educational attainment. Other data sources showcase trends in post-secondary education among different racial/ethnic groups:

- College participation. The U.S. Department of Labor Bureau of Labor Statistics reported that nearly 3 million students ages 16 to 24 graduated high school in 2013 and about two-thirds enrolled in college.[40] The enrollment rate was highest for Asian American students (79%), followed by non-Hispanic whites (67%), African Americans (59%) and Hispanic Americans (60%).

- Engineering-related degrees. Recent data from the National Science Foundation show approximately 12 percent of all bachelor's degrees in engineering fields in the United States in 2012 were awarded to Asian American students. Hispanic Americans were awarded 9 percent of bachelor's degrees in engineering and African Americans were awarded 4 percent of the engineering degrees. Native Americans were awarded less than 1 percent of engineering degrees in 2012.[41]

  According to the Society for Women Engineers, the number of undergraduate degrees awarded to women in engineering disciplines steadily increased from 1966 to 2000. Between 2000 and 2005, the proportion of undergraduate engineering degrees awarded to women leveled off at

[40] College enrollment rates have remained relatively unchanged over the past 10 years, ranging from 66 to 70 percent.

[41] The percentage of bachelor degrees in engineering awarded to non-Hispanic white students has remained relatively unchanged over the last decade of data (71% in 2002 and 68% in 2012).

about 20 percent, and dropped to about 18 percent by 2010.[42] The number of graduate degrees awarded to women has consistently increased since the 1960s; in 2004 22 percent of Master of Engineering degrees awarded to women and 18 percent of Doctorates in Engineering were awarded to women.[43]

Employment. Figure E-10 compares the demographic composition of workers in the Montana engineering industry to that of all workers in Montana who are 25 years or older and have a college degree.

Race/ethnicity. In 2008-2012, about 7 percent of the workforce in the Montana engineering industry was represented by minorities. This is about the same as the representation of minorities among the Montana workforce 25 years and older with a four-year college degree.

Gender. Compared to their representation among workers 25 and older with a college degree in all other industries, women comprise a small portion of employees in the Montana engineering industry. In 2008-2012, women represented about 34 percent of engineering-related workers in Montana, and 51 percent of workers with a four-year college degree in other industries.

Figure E-10.
Demographic distribution of workers in engineering industry and workers age 25 and older with a four-year college degree in all other industries, Montana, 2008-2012

Montana	Engineering		All other industries
Race/ethnicity			
Minority	6.9 %		6.0 %
Non-Hispanic white	93.1		94.0
Total	100.0 %		100.0 %
Gender			
Female	34.3 %	**	51.3 %
Male	65.7	**	48.7
Total	100.0 %		100.0 %

Note: *,** Denote that the difference in proportions between engineers and workers in all other industries for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively. The engineering industry includes "architectural, engineering and related services."

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

[42] Society of Women Engineers, Education Statistics on Women in Engineering in the USA. Feb 8, 2012. Retrieved August 17, 2015, from http://societyofwomenengineers.swe.org/trends-stats/3294-education.
[43] Ibid.

Summary

Although racial and ethnic minorities comprise 10 percent of the Montana workforce, only 5 percent of business owners in construction and engineering are minority. Women are 47 percent of the Montana workforce and 9 percent of construction and engineering business owners. Keen Independent explored whether barriers to entry and advancement within the Montana construction and engineering industries might partly explain these overall differences.

- Minorities comprise about the same share of the Montana construction workforce as found in other industries overall. Other than for African Americans in 2000, there were no statistically significant differences in the representation of minority groups in 2000 and 2008-2012 in the Montana construction industry compared with other industries as a whole. There is little statistical evidence of barriers to entering this industry for minorities living in Montana.
- Workers who are minority comprise a smaller share of the Montana engineering workforce (7%) than other industries in Montana (10%). However, the percentage of Hispanic Americans and Native Americans who are college graduates is lower than other groups, which may explain the low representation of minorities in the engineering industry.
- Women account for a smaller portion of the Montana construction industry (9%) and engineering workforce (34%) compared with other industries. These results indicate that there may be gender-based barriers to entry into these industries in Montana. For engineering, some of this underrepresentation of women is related to differences in male and female students obtaining engineering degrees.

In addition to the effects of any barriers to entry into construction jobs, any barriers to advancement in the construction industry might also affect the relative number of minority and female business owners in Montana.

- Although small sample sizes limit conclusions, representation of minorities and women is much lower in certain construction trades compared with other trades.
- Relatively few minorities working in the Montana construction industry have advanced to the level of first-line supervisor or manager.

In sum, for minorities, data show differences in advancement within the construction industry that might indicate different treatment of minorities. For women, there may be gender-based barriers to entry into the construction and engineering industries as well as advancement in the construction industry. These results suggest that there might be fewer minority-owned construction firms and women-owned construction and engineering firms in Montana than if no differences existed in opportunities for entry and advancement for minorities and women. The results for Montana are consistent with data for the United States as a whole.

Appendix F, which follows, examines rates of business ownership among individuals working in the Montana construction and engineering industries.

APPENDIX F.
Business Ownership in the Montana Construction and Engineering Industries

Nearly one in three people working in construction in Montana in 2008-2012 was a self-employed business owner. About one in six people working in the state's engineering industry was a business owner. Focusing on construction and engineering, Keen Independent examined business ownership rates for different racial, ethnic and gender groups using Public Use Microdata Samples (PUMS) from the 2000 Census and from the 2008-2012 American Community Survey (ACS).

Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level.[1] Although self-employment rates have increased for minorities and women over time, a number of studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. Note that Keen Independent and other researchers use "self-employment" and "business ownership" interchangeably. When examining U.S. Census data or American Community Survey data, Keen Independent and other researcher classify workers as self-employed if they report that they worked in their own unincorporated or incorporated business (see Appendix I).

Construction industry. Many people working in the Montana construction industry own their businesses. In 2008-2012, 32 percent of workers in the Montana construction industry were self-employed compared with 14 percent of workers across all industries. Figure F-1 shows the percentage of workers in the construction industry in 2000 and 2008-2012 who were self-employed.

Business ownership rates in 2000. In 2000, 30 percent of non-Hispanic whites working in the construction industry were self-employed. Business ownership rates were less than half that rate for Native Americans (14%), a statistically significant difference. There was also a lower rate of self-employment among all other minorities (25%), although this difference was not statistically significant.

There was no significant difference in business ownership rates in the construction industry between men (29.3%) and women (28.7%) in 2000.

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[1] 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, Volume 31, Issue 4, 757-793.; Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital*. Journal of Labor Economics, 25(2), 289-323.; and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses*. Russell Sage Foundation. Chatterji, Aaron K, Chay, Kenneth Y. and Robert W. Fairlie. 2013. *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment*. Working Paper. Retrieved from http://www.nber.org/papers/w18884.

Business ownership in 2008-2012. Between 2000 and 2008-2012, business ownership rates in the Montana construction industry grew across groups. The differences between minority groups and non-Hispanic whites persisted, with a significant difference between the rate of business ownership between Native Americans (14%) and non-Hispanic whites (33%). The rate of business ownership among women (36%) was slightly higher than for men (32%), however, the difference was not statistically significant.

Figure F-1.
Percentage of workers in the Montana construction industry who were self-employed, 2008-2012 and 2000

Montana	2008-2012	2000
Race/ethnicity		
Native American	13.7 % **	13.5 % **
All other minority	26.7	25.2
Non-Hispanic white	33.2	30.0
Gender		
Female	35.9 %	29.3 %
Male	31.6	28.7
All individuals	31.9 %	28.7 %

Note: *, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

All other minority includes African Americans, Asian Americans, and Hispanic Americans. Results for these groups were not reported individually due to small sample sizes.

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

Engineering industry. Keen Independent also examined business ownership rates for men and women in the Montana engineering industry. Figure F-2 presents results for 2000 and 2008-2012. Keen Independent could not compare results for minorities working in the engineering industry in Montana due to small sample sizes.

Business ownership rates in 2000. In 2000, the rate of self-employment for women working in the engineering industry was about one-third that of men (statistically significant difference). The right-hand column of Figure F-2 provides results for self-employment rates in 2000.

Business ownership rates in 2008-2012. For 2008 to 2012, about 4 percent of women in the Montana engineering industry were self-employed compared with 22 percent of men. The difference between the two groups was statistically significant.

Figure F-2.
Percentage of workers in the Montana engineering industry who were self-employed, 2000 and 2008-2012

Montana	2008-2012	2000
Gender		
Female	4.4 % **	7.9 % **
Male	22.2	22.3
All individuals	16.1 %	18.9 %

Note: *, ** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Figures for minority groups were omitted due to small sample sizes for each minority group individually, as well as all groups combined.

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

Potential causes of differences in business ownership rates. Nationally, researchers have examined whether there are disparities in business ownership rates after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- Financial capital. Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion, and survival.[2] In addition, one study found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.[3] However, unexplained differences still exist when statistically controlling for those factors.[4] Recent research using data from 2007 through 2010 indicates that minorities (including African Americans and Hispanic Americans) face greater credit constraints at business startup and throughout business ownership than non-Hispanic whites, even after controlling for other factors including credit score.[5] (Access to capital is discussed in more detail in Appendix G.)

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[2] 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). 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. Chatterji, Aaron K, Chay, Kenneth Y. and Robert W. Fairlie. 2013. *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.* Working Paper. Retrieved from http://www.nber.org/papers/w18884.

[3] Fairlie, Robert W. and Harry A. Krashinksy. 2006. Liquidity Constraints, Household Wealth and Entrepreneurship Revisited.

[4] 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).

[5] Robb, Alicia. 2012. "Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms." Small Business Administration. Chatterji, Aaron K, Chay, Kenneth Y. and Robert W. Fairlie. 2013. *The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.* Working Paper. Retrieved from http://www.nber.org/papers/w18884.

- Education. Education has a positive effect on the probability of business ownership in most industries. However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.[6] Recent research confirms a significant relationship between education and ability to obtain startup capital.[7]
- Intergenerational links. Intergenerational links affect one's likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.[8]
- Immigration to the United States. Time since immigration and assimilation into American society are also important determinants of self-employment, but unexplained differences in business ownership between minorities and non-minorities still exist when accounting for those factors.[9]

Business Ownership Regression Analysis

To further examine business ownership in Montana, Keen Independent developed multivariate regression models. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for other personal and family characteristics.

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 analyzed in other disparity studies. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and engineering industries persist after statistically controlling for race- and gender-neutral personal characteristics. [10, 11,12] Those studies have incorporated probit econometric models using PUMS data from the 2000 Census, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

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[6] See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment*. Sociological Perspectives. 79-94.

[7] Robb, Alicia, Fairlie, Robert w. and Robinson, David T. 2009. "Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey." Working Paper. Federal Reserve Bank of Cleveland.

[8] 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.

[9] See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment*. Sociological Perspectives. 79-94.

[10] National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

[11] National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

[12] BBC Research & Consulting. 2007. *Availability and Disparity Study*. Prepared for the California Department of Transportation.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or "explanatory" variables, such as:[13]

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household, and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.

Keen Independent developed a probit regression models using PUMS data from the 2008-2012 ACS that included 1,918 observations.

Montana construction industry in 2008-2012. Figure F-3 presents the coefficients for the probit model for individuals working in the Montana construction industry in 2008-2012. Several factors were important and statistically significant in predicting the probability of business ownership:

- Older workers were associated with a *higher* probability of business ownership, and this effect diminished for the oldest workers; and
- Workers with more children were associated with a *higher* probability of business ownership.

After statistically controlling for factors other than race, ethnicity and gender, there was a statistically significant disparity in business ownership for Native Americans working in the Montana construction industry. Native Americans working in the Montana construction industry were less likely to own construction businesses than similarly-situated non-minorities or men. There was no statistically significant effect for other minority groups or for women.

[13] Probit models estimate the effects of multiple independent or "predictor" variables in terms of a single, dichotomous dependent or "outcome" variable — in this case, business ownership. The dependent variable is binary, coded as "1" for individuals in a particular industry who are self-employed and "0" for individuals who are not self-employed. The model enables estimation of the probability that workers in a given sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

Figure F-3.
Montana construction industry business ownership model, 2008-2012

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

All minorities except Native American were grouped into one variable, due to small sample sizes.

Source:

Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-2.4770 **
Age	0.0586 **
Age-squared	-0.0004 *
Married	0.1030
Disabled	-0.1180
Number of children in household	0.1040 **
Number of people over 65 in household	-0.0329
Owns home	-0.0116
Home value ($0,000s)	0.0003
Monthly mortgage payment ($0,000s)	0.0779
Interest and dividend income ($0,000s)	0.0068
Income of spouse or partner ($0,000s)	-0.0014
Speaks English well	0.0987
Less than high school education	0.1600
Some college	0.1210
Four-year degree	0.0025
Advanced degree	-0.1840
Native American	-0.6240 **
Other minority	-0.0080
Female	0.0517

Simulations of business ownership rates. Probit modeling allows for further analysis of the disparities identified in business ownership rates for Native Americans. Keen Independent modeled business ownership rates for this group as if these workers had the same probability of business ownership as similarly situated non-Hispanic white males.

- Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.[14]

- After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of Native Americans working in the Montana construction industry (i.e., indicators of educational attainment as well as indicators of personal financial resources and constraints) to estimate the probability of business ownership of Native Americans. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

Figure F-4 presents the simulated business ownership rate (i.e., "benchmark" rate) for Native Americans, and compares it to the actual, observed mean probabilities of business ownership for that group. The disparity index was calculated by dividing the actual business ownership rate for Native Americans by that group's benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be

[14] That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers. Note that the "actual" self-employment rates are for the dataset used for these regression analyses and slightly differ from the entire 2008-2012 data.

Results show that the actual business ownership rate for Native Americans (14%) was lower than the benchmark rate of 31 percent. The corresponding disparity index was 46, indicating that Native Americans working in the Montana construction industry owned businesses at about one-half of the rate that would be expected based on simulated ownership rates of non-Hispanic white males. This indicates a substantial disparity in the business ownership rates for Native Americans working in the Montana construction industry.

Figure F-4.
Comparison of actual business ownership rates to simulated rates for Native American workers in the Montana construction industry, 2008-2012

Group	Self-employment rate Actual	Self-employment rate Benchmark	Disparity index (100 = parity)
Native American	14.2 %	31.0 %	46

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Montana engineering industry in 2008 through 2012. Keen Independent developed a separate business ownership model for the Montana engineering industry using 2008-2012 ACS data. Figure F-5 presents the coefficients from that probit model.[15] Due to the small sample size of minority workers, race and ethnicity variables were not included in the regression model.

After controlling for personal and family characteristics, there was a statistically significant disparity in the business ownership rate for women working in the Montana engineering industry.

[15] Speaking English well was excluded from the engineering industry model because nearly every individual in the dataset spoke English well.

Figure F-5.
Montana engineering industry business ownership model, 2008-2012

Note:

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

All minority variables were omitted due to small sample size.

Source:

Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Variable	Coefficient
Constant	-8.1970 **
Age	0.2270 *
Age-squared	-0.0020
Married	0.2140
Disabled	-1.0190
Number of children in household	-0.1610
Number of people over 65 in household	0.3900
Owns home	1.1550 *
Home value ($0,000s)	-0.0002
Monthly mortgage payment ($0,000s)	0.1040
Interest and dividend income ($0,000s)	0.0046
Income of spouse or partner ($0,000s)	0.0028
Less than high school education	-0.1200
Some college	0.1610
Four-year degree	0.2050
Advanced degree	0.3060
Female	-0.9170 **

Simulations of business ownership rates. Using the same approach as for the construction industry, Keen Independent simulated business ownership rates in the Montana engineering industry. Figure F-6 presents actual and simulated ("benchmark") business ownership rates for non-Hispanic women in the Montana engineering industry. The actual business ownership rate of women in the Montana construction industry was about 6 percent compared to a benchmark rate of 18 percent. This disparity index of 31 indicates that white women owned businesses at less than one-third of the rate that would be expected based on simulated ownership rates of white males.

Figure F-6.
Comparison of actual business ownership rates to simulated rates for female workers in the Montana engineering industry, 2008-2012

Group	Self-employment rate Actual	Self-employment rate Benchmark	Disparity index (100 = parity)
Non-Hispanic white female	5.6 %	18.0 %	31

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Source: Keen Independent Research from 2008-2012 ACS Public Use Microdata samples. The 2008-2012 raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Summary of Business Ownership in the Construction and Engineering Industries

Business ownership rates for Native Americans working in the Montana construction industry were substantially lower than that of non-Hispanic whites (statistically significant differences in both 2000 and 2008-2012). Regression analysis for 2008-2012 indicated that Native Americans working in the Montana construction industry had about one-half the rate of business ownership as similarly situated non-Hispanic males, a substantial disparity.

There were also statistically significant differences in business ownership rates for women working in the Montana engineering industry. Compared to men, business ownership rates were substantially lower for women in 2000 and 2008-2012. The gender-based difference in business ownership persisted in the regression analysis that accounted for other personal characteristics. The rate of business ownership for women working in the industry was about one-third that of white men after controlling for these personal characteristics, a substantial disparity.

In sum, business ownership for Native Americans working in the Montana construction industry appear to be negatively affected based on race. Business ownership rates in the Montana engineering might be negatively affected based on gender.

Similar to the results concerning barriers to employment and advancement in Appendix E, there are fewer Native American-owned construction firms and women-owned engineering firms in Montana today than if there had been no racial or gender differences in business ownership opportunities.

APPENDIX G.
Access to Capital for Business Formation and Success

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.[1, 2] Researchers have also found that the amount of startup capital can affect long-term business success, and, on average, minority- and women-owned businesses appear to have less startup capital than non-Hispanic white-owned businesses and male-owned businesses.[3] For example:

- In 2007, 30 percent of majority-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had startup capital of $25,000 or more;[4]
- Only 17 percent of African American-owned businesses indicated a comparable amount of startup capital;
- Disparities in startup capital were identified for every other minority group except Asian Americans; and
- Nineteen percent of female-owned businesses reported startup 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).

Similar research using longitudinal data from 2004 through 2006 found African American-owned firms received significantly lower levels of external startup capital, after controlling for owner and business characteristics, and relied more on owner equity funding. This finding persisted in subsequent years of business operation.[5]

Race- or gender-based discrimination that affects startup capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.[6]

Keen Independent examined access to capital in Montana. Appendix G begins by presenting information about homeownership and mortgage lending as home equity can be an important source of capital to start and expand businesses. The appendix then presents information about business loans, assessing whether minorities and women experience any difficulties acquiring business capital.

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[1] 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.

[2] Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

[3] Ibid.

[4] 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.

[5] Robb, Alicia, Fairlie, Robert w. and Robinson, David T. 2009. "Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey." Working Paper. Federal Reserve Bank of Cleveland.

[6] Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

Homeownership and Mortgage Lending

Keen Independent 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. In sum:

- A home is a tangible asset that provides borrowing power;[7]
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;[8]
- Next to business loans, mortgage loans have traditionally been the second largest loan type for small businesses;[9] and
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses.[10]

Any barriers to homeownership and home equity growth for minorities and women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. Recent research confirms the importance of homeownership on the likelihood of starting a business, even when examined separately by recent work history (independently examining workers that recently experienced a job loss and those that did not). A strong relationship exists between increases in home equity and entry into self employment for both groups.[11] Keen Independent analyzed homeownership rates and home values before considering loan denial and subprime lending.

It is important to note that the Great Recession depressed homeownership rates, reduced home values and equity in homes, and changed the mortgage finance market. Nationally and in Montana, lower (or negative) equity in a home and tighter lending standards during the Great Recession may have limited home equity as source of capital for many existing or potential business owners. Therefore, the following examination of homeownership and mortgage lending in Montana considers conditions before and after the start of the Great Recession in 2007.

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[7] Nevin, Allen. 2006. "Homeownership in California: A CBIA Economic Treatise." *California Building Industry Association.* 2.

[8] Jackman, Mary R. and Robert W. Jackman 1980. "Racial Inequalities in Home Ownership." *Social Forces.* 58. 1221-1234.

[9] 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.

[10] Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth and Discrimination." *Journal of Business.* 78:2153-2178.

[11] Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth and Entrepreneurship Revisited. *Review of Income and Wealth.* 58(2).

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.[12] For example, in the past, a woman's participation in homeownership was secondary to that of her husband and parents.[13]

Figure G-1 presents the percentage of households in each racial/ethnic group in Montana that were homeowners in 2000 (based on Census of Population data) and 2008 through 2012 (based on U.S. Bureau of the Census American Community Survey or "ACS" data).

In Montana, about 70 percent of non-Hispanic whites owned homes based on 2000 data and 2008-2013 data. Substantially fewer minorities owned homes in Montana in 2000 and in 2008-2012 compared with non-Hispanic whites. There were statistically significant disparities in homeownership for African Americans, Asian Americans, Hispanic Americans and Native Americans for both time periods. For example, 24 percent of African American households owned homes in 2008-2012, about one-third the rate of homeownership of non-Hispanic whites.

The data for Montana indicate that relatively fewer minorities compared with non-Hispanic whites have had access to equity in a home for starting or expanding a business.

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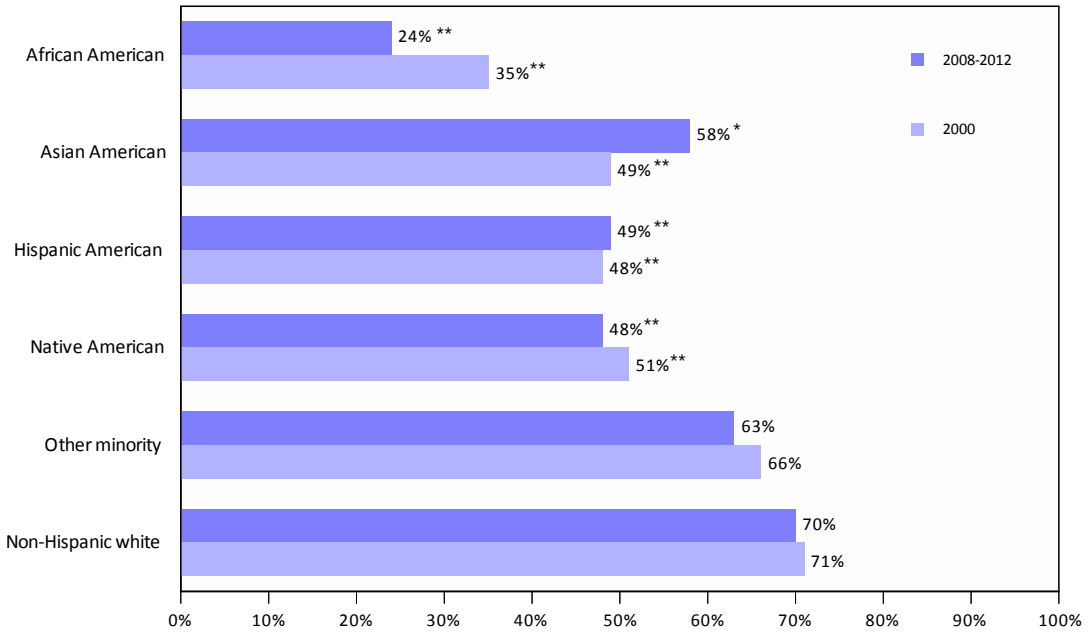
[12] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72:166-170.

[13] Card, Emily. 1980. "Women, Housing Access, and Mortgage Credit." *Signs*. 5:215-219.

Figure G-1.
Homeownership rates in Montana, 2000 and 2008-2012



Note: The sample universe is all households. ** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

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

Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For decades, research has found that the probability of homeownership is considerably lower for African Americans than is for comparable non-Hispanic whites throughout the United States.[14] Recent research shows that while African Americans narrowed the homeownership gap in the 1990s, the first half of the following decade brought little change and the second half of the decade brought significant losses in homeownership, resulting in a widening of the gap between African Americans and non-Hispanic whites.[15]

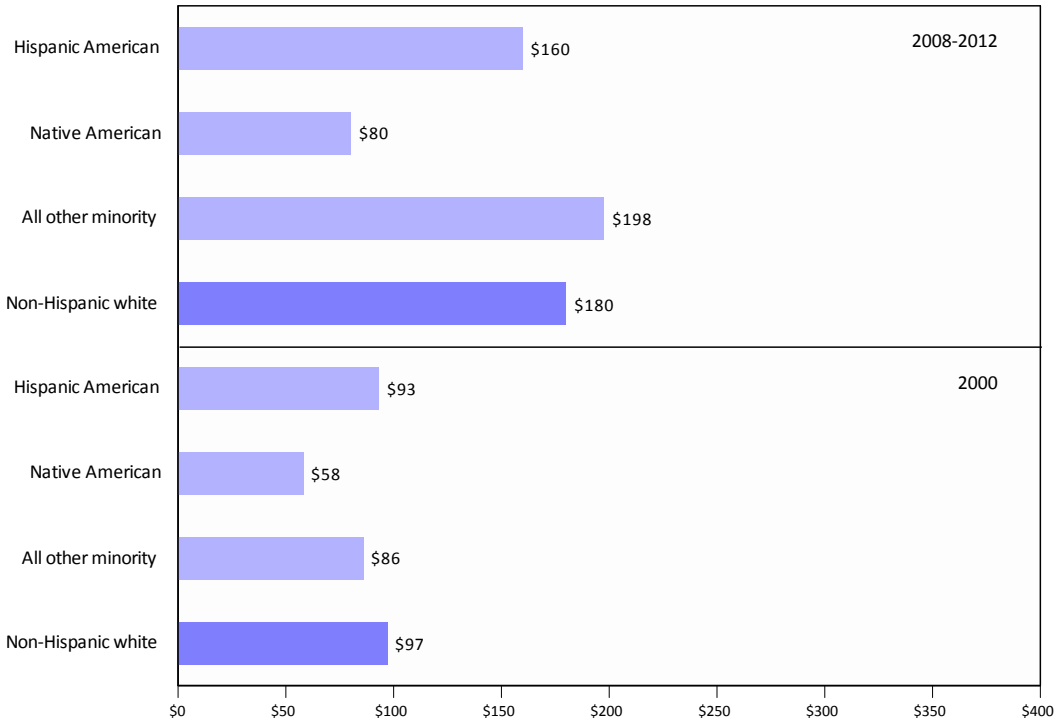
Home values. In addition to studying homeownership rates by gender and race/ethnicity, it is important to consider the value of homes people own as that value represents an outside limit of accessible capital from the asset. Using 2000 Census data and 2008-2012 ACS data, Keen Independent compared median home values by group in Montana. The median value of homes owned by non-Hispanic whites was about $97,000 in 2000 and $180,000 in 2008-2012 (home prices rose in Montana in the first half of the 2000s before declining during the Great Recession).

[14] For example, Jackman. 1980. "Racial Inequalities in Home Ownership."

[15] Rosebaum, E. 2012. "Home Ownership's Wild Ride, 2001-2011." U.S. 2010 Project, Census Brief. New York: Russell Sage Foundation.

The median value of homes owned by Native Americans and Hispanic Americans in Montana was less than homes owned by non-Hispanic whites in both 2000 and 2008-2012.

Figure G-2.
Median home values in Montana, 2000 and 2008-2012, thousands



Note: The sample universe is all owner-occupied housing units.

Results for African Americans and Asian Americans are not shown due to small sample sizes.

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

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when seeking home mortgages. Therefore, any such discrimination could have lasting effects. In a recent lawsuit, Bank of America paid $335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of "statistically significant disparities by race and ethnicity" among Countrywide Financial customers.[16]

Keen Independent explored market conditions for mortgage lending in Montana. 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.[17] Those data include information about the location, dollar amount, and types of loans made, as well as race, ethnicity, income, and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

Keen Independent examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007 and 2013. Although 2013 provides more current 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 2013 reporting date for HMDA data.[18] For example, the 2007 HMDA data include information about 46,000 loan applications in Montana that 393 lenders processed. The 2013 HMDA data for Montana include information about 28,000 loan applications that 233 lenders processed. In addition, the percentage of government-insured loans, which Keen Independent did not include in its analysis, increased dramatically between 2007 and 2013, decreasing the proportion of total loans analyzed in the 2013 data.[19]

Mortgage denials. Keen Independent examined mortgage denial rates on conventional loan applications for high-income borrowers. Conventional loans are loans that are not insured by a government program. High-income borrowers are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.[20] Loan

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[16] 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.

[17] Financial institutions were required to report 2013 HMDA data if they had assets of more than $42 million, have a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies are required to report HMDA data if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year or equal $25 million or more, are located in a Metropolitan Statistical Area (MSA; or originated five or more home purchase loans in an MSA) and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

[18] 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: http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft.pdf.

[19] 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.

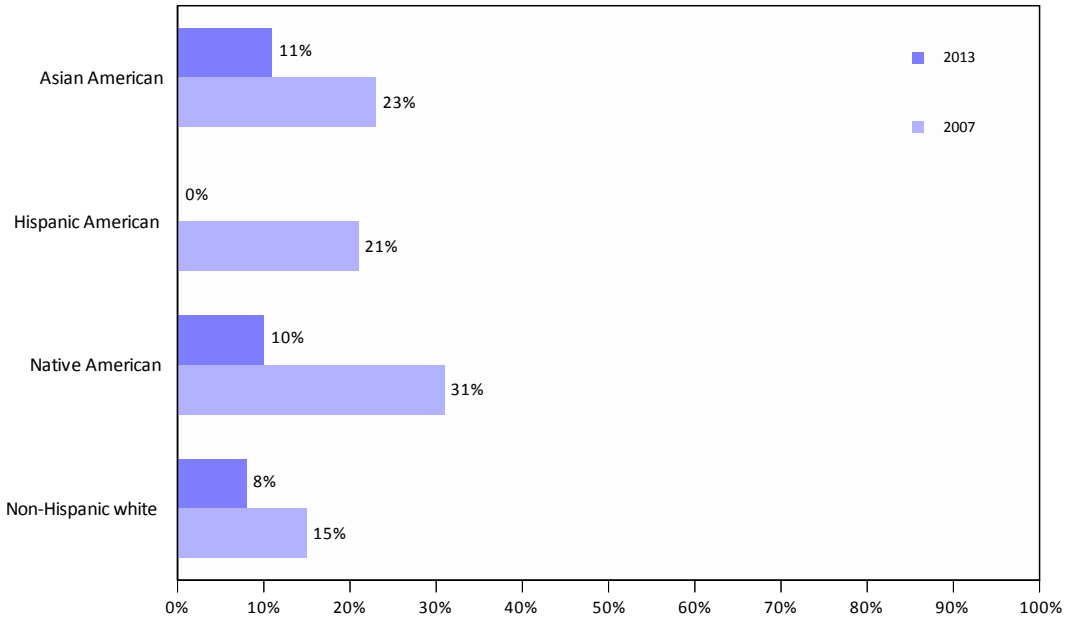
[20] The median family income in 2012 was about $65,000 for the United States as a whole and $61,600 for Montana. Median family income for 2007 was about $59,000 for the United States as a whole and $54,400 for Montana. Source: U.S. Department of Housing and Urban Development, FY 2007 Income Limits and FY 2012 Income Limits.

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.[21]

Figure G-3 presents loan denial results for high-income households in Montana in 2007 and 2013. In 2007, Asian American, Hispanic American, and Native American high-income applicants exhibited higher loan denial rates compared with high-income non-Hispanic white applicants.[22] The denial rate for high-income Native Americans (31%) was more than twice the rate of high-income non-Hispanic white applicants (15%). Results for African Americans were not analyzed due to the small number of African American applicants in Montana.

Even though mortgage loan denial rates for high-income households had fallen in Montana by 2013 for most groups, each minority group except for Hispanic Americans had higher loan denial rates than non-Hispanic whites. The difference between minority groups improved, however, and the Native American rate (10%) was only slightly higher than the non-Hispanic white rate (8%).

Figure G-3.
Denial rates of conventional purchase loans to high-income households,
Montana, 2007 and 2013



Note: High-income borrowers are those households with 120% or more than the HUD area median family income (MFI).
Results for African Americans are not shown because of the small number of loans for this group.
Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.

Source: Keen Independent Research from FFIEC HMDA data 2007, and 2013.

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[21] For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

[22] HMDA data group Native Hawaiians and other Pacific Islanders into a single category. According to 49 CFR 26.5 Native Hawaiians are considered Native Americans but other Pacific Islanders are considered Asian. Since the HMDA racial group cannot be split nor accurately included in Native Americans or Asian Americans, it is shown as an individual racial category.

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.[23] It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.[24] The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.[25]
- 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.[26]
- Results of 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.[27]
- Results of a study that included Montana indicated that mortgage loan applicants who were not the "traditional" non-Hispanic white opposite-sex couples encountered persistently higher mortgage application denial rates than "traditional" couples.[28]
- Results of a study looking at consumer credit on American Indian Reservations indicated that certain forms of credit, especially mortgages, were limited for reservation households. Moreover, the study found that there were poor or limited credit histories among reservation residents.[29]

Other studies have found that differences in preferences for Federal Housing Administration (FHA) loans — mortgage loans that the government insures — versus conventional loans among racial and ethnic groups may partially explain disparities found in conventional loan approvals between minorities and non-minorities.[30] Several studies have found that, historically, minority borrowers are far more likely to seek FHA loans than comparable non-Hispanic white borrowers across different

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[23] 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.

[24] Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives*. 12:41-62.

[25] Yinger, John. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. New York: Russell Sage Foundation, 71.

[26] 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.

[27] 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.

[28] Hirasuna, Donald P. and Ryan Allen. 2012. "The Resurgence of Denial Rates for Home Loans: An Examination of Disparate Effects on Groups of Applicants in the Upper Midwest." *Housing Policy Debate*. 22 (4): 573-603.

[29] Dimitrova-Grajzl, Valentina P. and Grajzl, Peter and Guse, A. Joseph and Todd, Richard M., Consumer Credit on American Indian Reservations (March 26, 2014). Available at SSRN:http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408747 or http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408747. Retrieved on November 12, 2015.

[30] Canner. 1991. "Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets."

income and wealth levels. The insurance on FHA loans protects the lender, but the borrower can be disadvantaged by paying higher borrowing costs. [31, 32]

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 the Great Recession, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for $330 billion of U.S. mortgages in 2003, up from $35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.[33] 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. Subprime loans also became available to homeowners who did not want to or could not make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost higher than what they would qualify for from a prime lender.[34] The higher interest rates and additional costs of subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

There are several commonly-used approaches to defining a subprime loan and examining rates of subprime lending. Keen Independent used a "rate-spread method" in which subprime loans are identified as those loans with substantially above-average interest rates.[35] Because lending patterns and borrower motivations differ depending on the type of loan sought, Keen Independent 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 presents the percentage of conventional home purchase loans that were subprime in Montana based on 2007 and 2013 HMDA data.

- In 2007, 23 percent of home purchase loans that were issued to Native Americans were subprime, nearly double the percentage for non-Hispanic whites (12%).
- Subprime loans also accounted for a relatively large portion of conventional home mortgages for Hispanic American borrowers.
- Relatively fewer Asian American borrowers had subprime loans (4%) than non-Hispanic white borrowers. Data on African Americans were not analyzed due to the small number of African Americans with home purchase loans in Montana.

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[31] Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 80.

[32] See definition of subprime loans discussed on the following page.

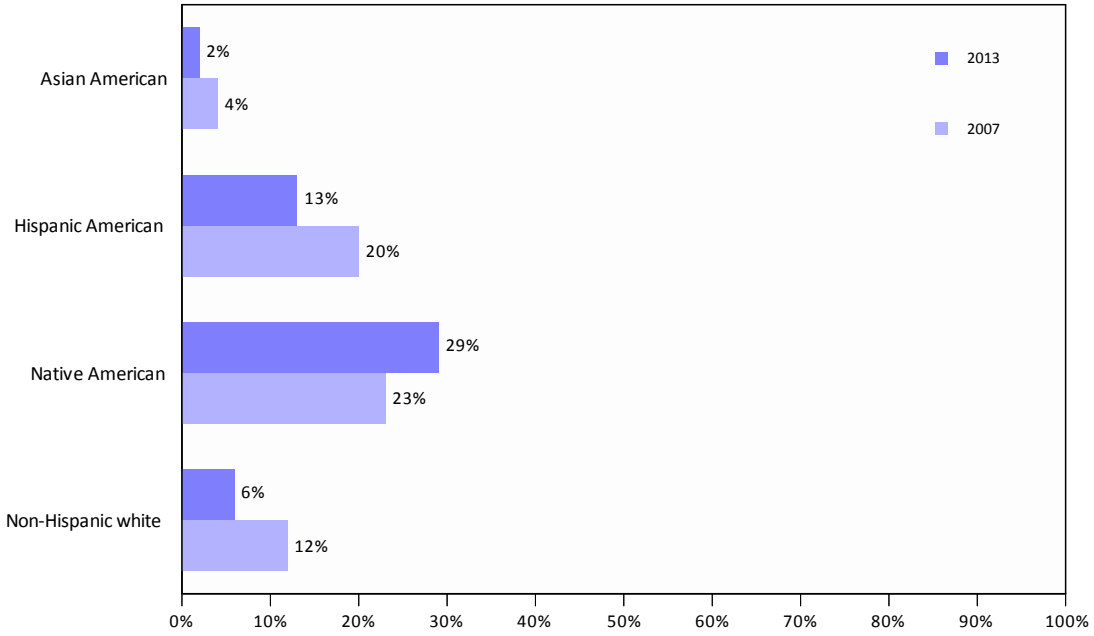
[33] Avery, Brevoort, and Canner, "The 2006 HMDA Data." Federal Reserve Bulletin, December 2007, pp. A73-A109.

[34] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston.*

[35] 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. Keen Independent identified subprime loans according to those measures in the corresponding time periods.

By 2013, subprime loans as a percentage of all conventional home purchase loans issued in Montana dropped for all groups except for Native Americans (29%). Subprime loans also accounted for a larger share of conventional home purchase loans for Hispanic Americans (13%) than for non-Hispanic whites (6%). The rate for Asian Americans remained lower (2%) than those for non-Hispanic whites.

Figure G-4.
Percent of conventional home purchase loans that were subprime, Montana, 2007 and 2013

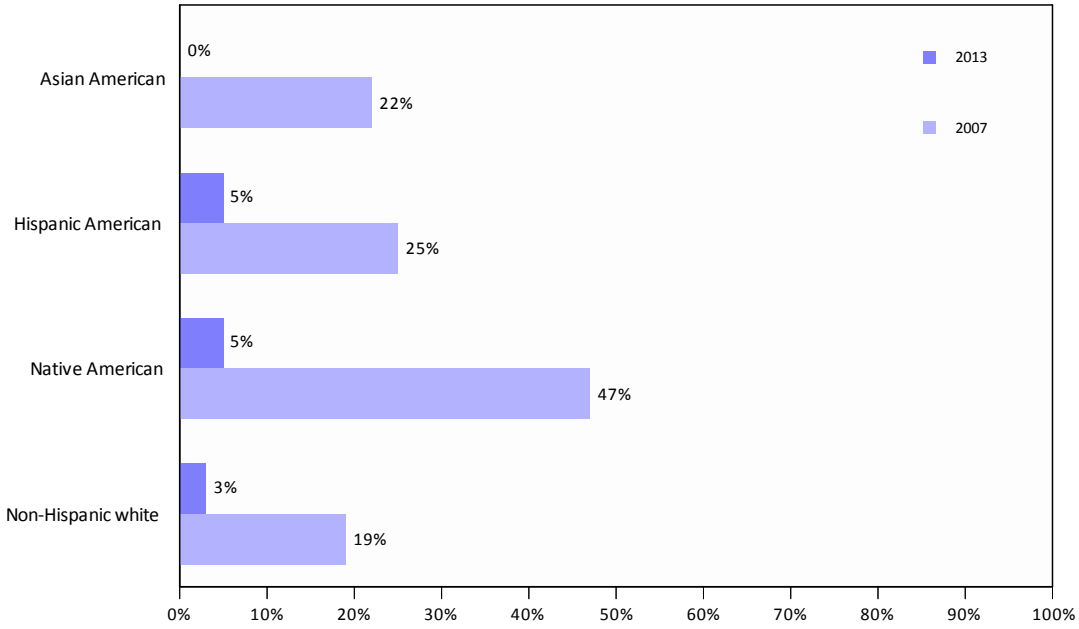


Note: Calculated as the percentage of originated loans that were subprime.
Results for African Americans are not shown because of the small number of loans for this group.

Source: Keen Independent Research from FFIEC HMDA data 2007 and 2013.

Figure G-5 presents similar information for conventional home refinance loans in Montana. In 2007, 19 percent of non-Hispanic white refinance borrowers in Montana obtained subprime loans. Subprime loans comprised a larger share of refinance loans for minority borrowers, at 22 percent for Asian Americans, 25 percent for Hispanic Americans, and 47 percent for Native Americans. In 2013, the share of conventional refinance mortgages that were subprime in Montana dropped to 3 to 5 percent for each racial/ethnic group, except Asian Americans, for whom the rate was 0 percent.

Figure G-5.
Percent of conventional refinance loans that were subprime, Montana, 2007 and 2013



Note: Calculated as the percentage of originated loans that were subprime.
Results for African Americans are not shown because of the small number of loans for this group.

Source: Keen Independent Research from FFIEC HMDA data, 2007 and 2013.

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."[36] Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.[37] 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.[38] 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.

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[36] 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."

[37] Freddie Mac. 1996, September. "Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families." *Freddie Mac.* (accessed February 5, 2007); and Lanzerotti. 2006. "Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California." *Federal Reserve Bank of San Francisco.*

[38] Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

- More recent analyses using 2006 HMDA data found that African American borrowers, going to the same lender and displaying similar financial characteristics, were significantly more likely to receive high-cost loans (those with an interest rate more than 3 percent higher than comparable U.S. Treasury instruments) compared to non-Hispanic whites.[39]
- Research using 2007 HMDA data analyzed differences between high-cost loans among borrowers of different racial and gender backgrounds at comparable income levels and found, on average, African American and Hispanic borrowers were about twice as likely to receive high-cost loans relative to similarly situated non-minority borrowers in most metropolitan areas throughout the country.[40].

Implications of the recent mortgage lending crisis. The turmoil in the housing market since late 2006 has been far-reaching, resulting in the loss of home equity, decreased demand for housing, and increased rates of foreclosure.[41] 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.[42] The preponderance of subprime lending is important because households that were repaying subprime loans had 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."[43]

Such problems substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses. That issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that "one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press."[44]

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[39] Maya Sen. 2012. "Quantifying Discrimination: Exploring the Role of Race and Gender and the Awarding of Subprime Mortgage Loans." Available at SSRN: http://ssrn.com/abstract=1593183

[40] National Council of Negro Women. 2009. "Income is No Shield, Part III-Assessing the Double Burden: Examining Racial and Gender Disparities in Mortgage Lending."

[41] Joint Center for Housing Studies of Harvard University. 2008. "The State of the Nation's Housing."

[42] Ibid.

[43] Gerardi, Shapiro, and P. Willen. 2008. "Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*.

[44] 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."

- 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."[45]

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.[46] 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.[47, 48] 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.[49] The study showed that there are substantial wealth disparities between African Americans and whites as well as 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 blacks or Hispanics. The study also reports that the 2007-2009 recession exacerbated wealth disparities, particularly for Hispanics.

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 startup and growth.

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[45] 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.

[46] 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.

[47] 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.

[48] National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

[49] McKernan, Signe-Mary, Caroline Ratcliffe, Eugene Steverle and Sisi Zhang. 2013. "Less Than Equal: Racial Disparities in Wealth Accumulation." Urban Institute.

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.[50] That practice can perpetuate problems in already poor neighborhoods.[51] 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.[52] Some studies found that 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.[53] Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business startup, because local banking sectors often finance local businesses.[54] 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.[55] 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.[56] Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

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.[57]

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.

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[50] 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.

[51] Ladd, Helen F. 1998. "Evidence on Discrimination in Mortgage Lending." *The Journal of Economic Perspectives.* 12:41-62.

[52] 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?" Holmes, Andrew and Paul Horvitz. 1994. "Mortgage Redlining: Race, Risk, and Demand." *The Journal of Finance.* 49:81-99.

[53] Yinger, John. 1995. "Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination." Russell Sage Foundation. New York. 78-79.

[54] Holloway. 1998. "Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio."

[55] Kantor, Amy C. and John D. Nystuen. 1982. "De Facto Redlining a Geographic View." *Economic Geography.* 4:309-328.

[56] Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78–79.

[57] Card. 1980. "Women, Housing Access, and Mortgage Credit."

For example, there is some past evidence that lenders under-appraised properties for female borrowers.[58]

Access to Business Capital

Barriers to accessing capital can have substantial impacts on small business formation and expansion. In-depth interviews with business owners and managers in Montana indicated a strong link between capital and the ability to start and grow a business. In addition, several studies have found evidence that startup capital is important for business profits, longevity and other outcomes. For example:

- The amount of startup capital is associated with small business sales and other outcomes;[59]
- Limited access to capital has affected the size of African American-owned businesses;[60, 61] and
- Weak financial capital was identified as a reason that more African American-owned businesses closed over a four-year period compared with non-Hispanic white-owned businesses.[62]

Bank loans are one of the largest sources of debt capital for small businesses.[63] Discrimination in the application and approval processes of those loans and other credit resources could be detrimental to the success of minority- and women-owned businesses. Previous studies have addressed racial/ethnic and gender discrimination in capital markets by evaluating:

- Loan denial rates;
- Loan values;
- Interest rates;
- Business owners' fears that loan applications will be rejected;
- Sources of capital; and
- Relationships between startup capital and business survival.

To examine the role of race/ethnicity and gender in capital markets, Keen Independent analyzed data from the Federal Reserve Board's 2003 Survey of Small Business Finances (SSBF) — the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The sample from 2003 contains records for 4,240 businesses.

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[58] Ladd, Helen F. 1982. "Equal Credit Opportunity: Women and Mortgage Credit." *The American Economic Review*. 72:166-170.

[59] See Fairlie, Robert W. and Harry A. Krashinsky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited"; and Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

[60] Grown, C. and Bates, T. 1992. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies." Journal of Urban Affairs, 14: 25–41.

[61] Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

[62] Grown, C. and Bates, T. 1992. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies." Journal of Urban Affairs, 14: 25–41.

[63] Data from the 1998 SSBF indicate that 70 percent of loans to small business are from commercial banks. That result is present across all gender and racial/ethnic groups with the exception of African Americans, whose rate of lending from commercial banks is even greater than other minorities. See Blanchard, Lloyd, Bo Zhao and John Yinger. 2005. "Do Credit Market Barriers Exist for Minority and Woman Entrepreneurs." *Center for Policy Research, Syracuse University*.

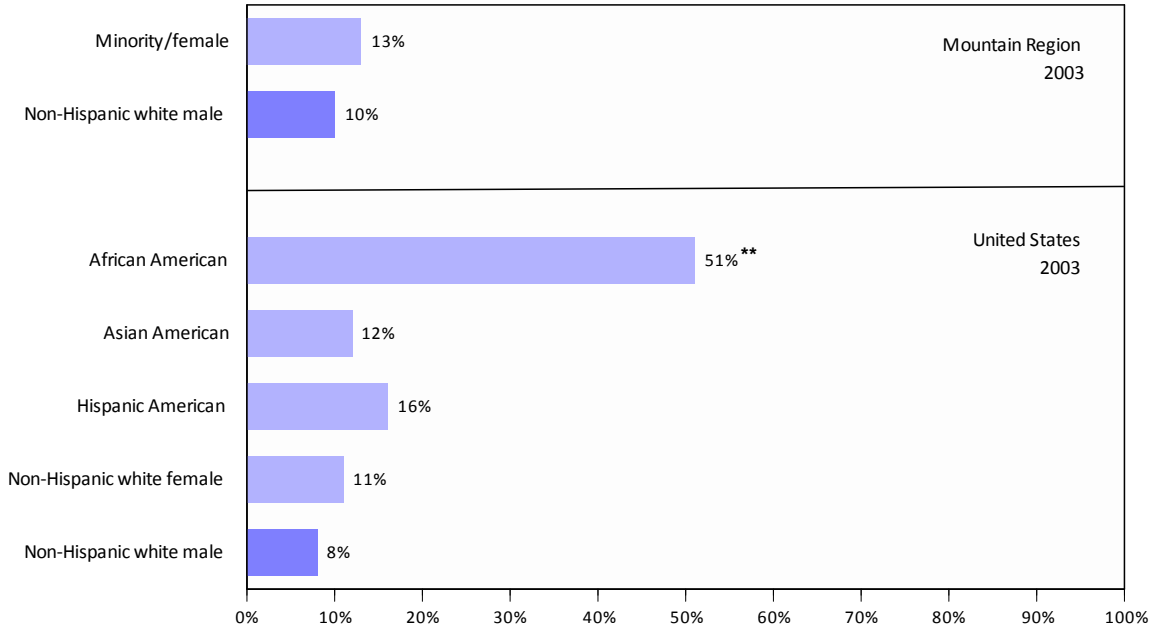
Keen Independent applied sample weights to provide representative estimates of loan denial and interest rates.

The SSBF reports business location by Census Division. The Mountain Census Division ("Mountain region") includes Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. It is the level of geographic detail most specific to Montana, and 2003 is the most recent SSBF information available as the survey was discontinued after that year. Although this information is somewhat dated, recent national surveys are consist with these results, as discussed in this appendix.

Loan denial rates. Figure G-6 presents loan denial rates from the 2003 SSBF for the Mountain region and for the United States.[64] National SSBF data for 2003 reveal that the loan denial rate for African American-owned businesses (51 was higher than for non-Hispanic white male-owned businesses (8%), a statistically significant difference. Denial rates were also higher for other minority groups and non-Hispanic white females but those differences were not statistically significant.

As shown in Figure G-6, about 13 percent of minority- and women-owned businesses in the Mountain region reported being denied loans in 2003, a larger percentage than the 10 percent of non-Hispanic white male-owned businesses that reported being denied loans. (Loan denial statistics on individual minority groups in the Mountain region are not reported in Figure G-6 due to relatively small sample sizes.)

Figure G-6.
Business loan denial rates, 2003



Note: ** Denotes that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

[64] The denial rates represent the proportion of business owners whose loan applications over the previous three years were always denied, compared to business owners whose loan applications were always approved or sometimes approved.

Other researchers' regression analyses of loan denial rates. Several studies have investigated whether disparities in loan denial rates for different racial/ethnic and gender groups exist after controlling for other factors that affect loan approvals. Study results include the following:

- Commercial banks are less likely to loan to African American-owned businesses than to non-Hispanic white-owned businesses after statistically controlling for other factors.[65]
- African American, Asian American and Hispanic American men are more likely to be denied loans than non-Hispanic white men. However, African American borrowers are more likely to apply for loans.[66]
- Disparities in loan denial rates between African American-owned and non-Hispanic white-owned businesses tend to decrease with increasing competitiveness of lender markets. A similar phenomenon is observed when considering differences in loan denial rates between male- and female-owned businesses.[67]
- The probability of loan denial decreases with greater personal wealth. However, accounting for personal wealth does not account for the large differences in denial rates across African American-, Hispanic American-, Asian American-, and non-Hispanic white-owned businesses. Specifically, information about personal wealth explained some differences between Hispanic- and Asian American-owned businesses and non-Hispanic white-owned businesses, but they explained almost none of the differences between African American-owned businesses and non-Hispanic white-owned businesses.[68]
- Loan denial rates are higher for African American-owned businesses than for non-Hispanic white-owned businesses after accounting for several factors such as creditworthiness and other characteristics. That result is largely insensitive to different model specifications. Consistent evidence on loan denial rates and other indicators of discrimination in credit markets was not found for other minorities or for women.[69]
- Women-owned businesses are no less likely to apply or to be approved for loans in comparison to male-owned businesses.[70]
- A recent study using Kauffman Firm Survey data found that African American- and Hispanic-owned firms had a lower probability of loan approval than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010 even after accounting for firm and owner characteristics. In 2010, Asian-owned firms were also less likely to be approved. Women-owned firms had a lower likelihood of loan approval than male-owned firms, but only for 2008.[71]

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[65] Cavalluzzo, Ken, Linda Cavalluzzo and John Wolken. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey." *Journal of Business.* 75: 641-679.

[66] Coleman, Susan. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances." *The Journal of Business and Entrepreneurship.* 151-166.

[67] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[68] Cavalluzzo, Ken and John Wolken. 2002. "Small Business Turndowns, Personal Wealth and Discrimination." *FEDS Working Paper No. 2002-35.*

[69] Blanchflower, David G., Phillip B. Levine and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics.* 85:930-943.

[70] Coleman. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances."

[71] Robb, Alicia. 2012. "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

Regression model for denial rates in the SSBF. Keen Independent developed regression models to explore the relationships between loan denial and the race, ethnicity and gender of business owners while statistically controlling for other factors. As discussed above, there is extensive literature on business loan denials that provides the theoretical basis for the regression models. Many studies have used probit econometric models to investigate the effects of various owner, business, and loan characteristics on the likelihood of loan denial. They include three general categories of variables:

- Owners' demographic characteristics (including race and gender), credit, and resources (13 variables);
- Business characteristics and credit and financial health (26 variables); and
- The environment in which businesses and lenders operate and characteristics of the loans (19 variables).[72]

After excluding observations where loan denial was imputed, businesses where no individual held at least 10 percent ownership and businesses where the largest shareholders were firms, the 2003 national sample included 1,854 businesses that had applied for a loan during the three years preceding the 2003 SSBF.

Given the relatively small sample size for the Mountain region (156 businesses) and the large number of variables in the model, Keen Independent included all U.S. businesses in the model and estimated any Mountain region effects by including regional control variables — an approach commonly used in other studies that analyze SSBF data.[73] The regional variables include an indicator variable for businesses located in the Mountain region and interaction variables that represent businesses owned by minorities or women that are located in the Mountain region.[74]

Figure G-7 on the following page presents the marginal effects from the probit model predicting loan denials. The dependent variable represented whether a company's loan applications over the past three years were always denied. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of loan denial.

The following characteristics were associated with a *higher* probably of loan denial:

- The owner's experience;
- Having existing vehicle loans;
- Being in the transportation, communications and utilities industry; and
- Location in a metropolitan area.

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[72] See, for example, Blanchard, Lloyd; Zao, Bo and John Yinger. 2005. "Do Credit Barriers Exist for Minority and Women Entrepreneurs*?" Center for Policy Research, Syracuse University.*

[73] Blanchflower, David G.; Levine, Phillip B. and David J. Zimmerman. 2003. "Discrimination in the Small-Business Credit Market." *The Review of Economics and Statistics*. 85(4): 930-943; NERA Economic Consulting. 2008. "Race, Sex, and Business Enterprise: Evidence from the City of Austin." *Prepared for the City of Austin, Texas*; and CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority*.

[74] Keen Independent also considered an interaction variable to represent firms that are both minority and female but the term was not significant.

The following characteristics were associated with a *lower* probably of loan denial:

- The owner possessing an advanced degree;
- Being an inherited businesses;
- Having an existing line of credit or savings account;
- Having filed for bankruptcy in the last 7 years; and
- Applying for business mortgages, vehicles, equipment, or other uses.

After statistically controlling for race- and gender-neutral influences, Keen Independent observed that businesses owned by African Americans were more likely to have their loans denied than other businesses.

The indicator variable for the Mountain region and the interaction terms for Mountain region and status as a minority- or female-owned business were not statistically significant. That result indicates that the probability of loan denials for minority- and women-owned businesses within the Mountain region is not significantly different from the U.S. as a whole after accounting for other factors.

Figure G-7.
Likelihood of business loan denial (probit regression) in the U.S. in the 2003 SSBF,
Dependent variable: loan denial

Variable	Marginal Effect		Variable	Marginal Effect		Variable	Marginal Effect	
Race/ethnicity and gender			**Firm's characteristics, credit and financial health**			**Firm and lender environment and loan characteristics**		
African American	0.180	**	D&B credit score = moderate risk	-0.012		Partnership	-0.007	
Asian American	-0.012		D&B credit score = average risk	0.027		S corporation	0.028	
Hispanic American	-0.012		D&B credit score = significant risk	0.010		C corporation	0.040	
Native American	0.020		D&B credit score = high risk	0.047		Construction industry	0.031	
Other minority	0.035		Total employees	0.000		Manufacturing industry	0.018	
Female	0.008		Percent of business owned by principal	0.000		Transportation, communications and utilities industry	0.203	**
Mountain region	-0.013		Family-owned business	-0.024				
Minority in Mountain region	0.076		Firm purchased	0.002		Finance, insurance and real estate industries	0.013	
Female in Mountain region	0.007		Firm inherited	-0.038	**			
			Firm age	-0.001		Engineering industry	0.001	
Owner's characteristics, credit and resources			Firm has checking account	-0.150		Other industry	0.005	
Age	-0.001		Firm has savings account	-0.021	**	Herfindahl index = .10 to .18	0.006	
Owner experience	0.002	**	Firm has line of credit	-0.094	**	Herfindahl index = .18 or above	0.034	
Some college	-0.011		Existing capital leases	-0.004		Located in MSA	0.025	**
Four-year degree	-0.005		Existing mortgage for business	0.016		Sales market local only	0.015	
Advanced degree	-0.027	**	Existing vehicle loans	0.021	*	Loan amount	0.000	
Log of Home Equity	0.001		Existing equipment loans	-0.011		Capital lease application	-0.015	
Owner has negative net worth	0.002		Existing loans from stockholders	0.022		Business mortgage application	-0.035	**
Bankruptcy in past 7 years	0.107		Other existing loans	0.033		Vehicle loan application	-0.055	**
Judgement against in past 3 years	0.016		Firm used trade credit in past year	-0.001		Equipment loan application	-0.022	*
Log of net worth excluding home	0.001		Log of total sales in prior year	-0.011		Loan for other purposes	-0.027	**
			Log of cost of doing business in prior year	-0.005				
			Log of total assets	0.002				
			Log of total equity	-0.001				
			Firm bankruptcy in past 7 years	-0.026	*			
			Firm delinquency in business transactions	0.015				

Note: * Statistically significant at 90% confidence level.
** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using chi-square test statistics from the probit coefficients associated with the marginal effects.

"Less than high school education," "Negative total assets," "Negative sales in prior year" and "Mining industry" perfectly predicted loan outcome and dropped out of the regression; "Negative total equity" dropped because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

Keen Independent simulated loan approval rates for African American-owned businesses by comparing observed approval rates with simulated approval rates. "Loan approval" means that a business owner always, or at least sometimes, had his or her business loan applications approved over the previous three years. "Rates" of loan approval means the percentage of businesses that received loan approvals (always or sometimes) during that time period. Approval rates were calculated by subtracting the denial rate from 100 (e.g., a denial rate of 40% would indicate an approval rate of 60%).

The probit modeling approach allowed for simulations of loan approval rates for African American-owned businesses as if they had the same probability of loan approval as similarly situated non-Hispanic white male-owned businesses. To conduct the simulation, Keen Independent took the following steps:

- Performed a probit regression analysis predicting loan approval using only non-Hispanic white male-owned businesses in the dataset.[75]
- Used the coefficients from that model and the mean characteristics of African American-owned businesses (including the effects of a business being in the Mountain region) to estimate the probability of loan approval of that group.

Based on 2003 SSBF data, the actual loan approval rate for African American-owned businesses was 53 percent. Model results showed that African American-owned businesses would have an approval rate of about 69 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses (disparity index of 78). The index of 78 suggests a substantial disparity between the actual loan approval rate and the rate for African American-owned businesses that might be expected for similarly-situated non-Hispanic white male-owned businesses. Figure G-8 presents these results.

Figure G-8.
Comparison of actual loan approval rates to simulated loan approval rates, 2003

	Loan approval rates		Disparity index
Group	**Actual**	**Benchmark**	**(100 = parity)**
African American	53.2%	68.5%	78

Note: Actual approval rates presented here may differ from denial rates in Figure G-6 because some observations were excluded from the probit regression.

"Loan approval" means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years.

Source: Keen Independent Research analysis of 2003 SSBF data.

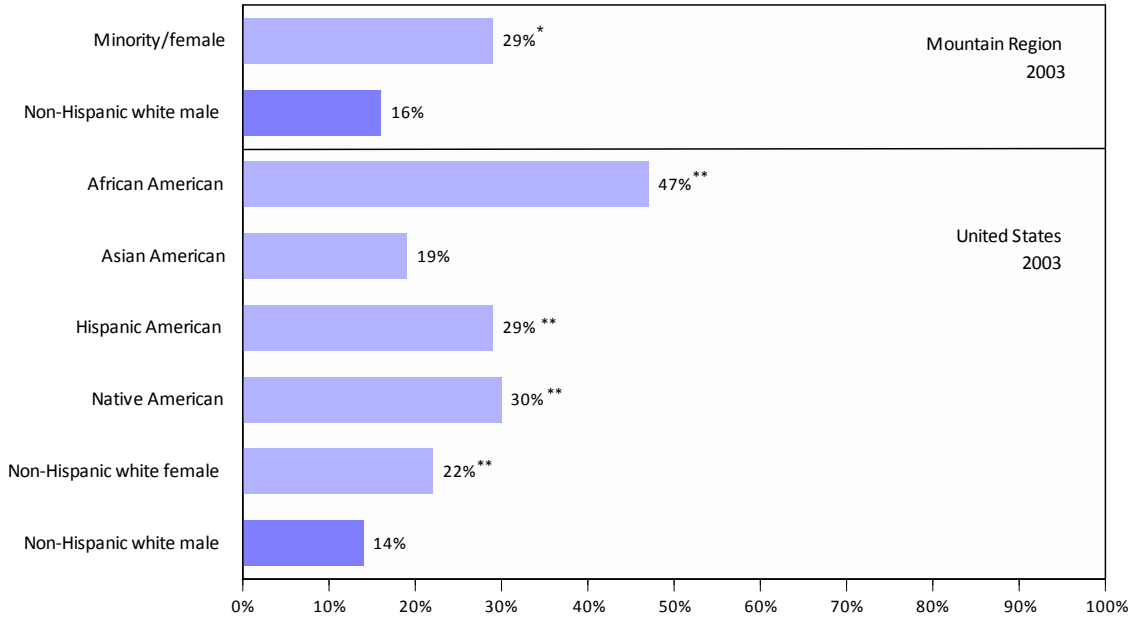
[75] That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

Applying for loans. Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. The SSBF includes a question that gauges whether a business owner did not apply for a loan due to fear of loan denial. Using data from the 2003 SSBF, Figure G-9 presents the percentage of businesses that reported needing credit but did not apply for loans because of fears of denial.

In the Mountain region, minority- and women-owned businesses that reported needing loans were about twice as likely as non-Hispanic white-owned firms to say that they did not apply for those loans because of fear of loan denial (statistically significant difference).

The bottom portion of figure G-9 shows national results for fear of loan denial by race, ethnicity and gender of the business owners. Nationwide, African American, Hispanic American and Native American business owners were more likely to forgo applying for business loans due to a fear of denial compared to non-Hispanic white male-owned businesses (statistically significant differences). Non-Hispanic white women-owned businesses were also more likely to forgo applying for loans due to a fear of denial (also a statistically significant difference).

Figure G-9.
Businesses that needed loans but did not apply due to fear of denial, 2003



Note: *, ** Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

Other researchers' regression analyses of fear of denial. Other studies have identified factors that influence the decision to apply for a loan, such as business size, business age, owner age, and educational attainment. Accounting for those factors can help in determining whether race/ethnicity or gender of business owners explains whether owners did not apply for a loan due to fear of loan denial. Results indicate that:

- African American and Hispanic American business owners are significantly less likely to apply for loans due to fear of denial.[76]

- After statistically controlling for educational attainment, there were no differences in loan application rates between non-Hispanic white, African American, Hispanic American, and Asian American male business owners.[77]

- African American-owned businesses were more likely than other businesses to report being seriously concerned with credit markets and were less likely to apply for credit in fear of loan denial.[78]

- A Small Business Administration study found that African American- and Hispanic American-owned firms were less likely to apply for credit when needed for fear of having the loan application denied than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010 after accounting for firm and owner characteristics. Women-owned firms were less likely than male-owned firms to apply for loans for fear of denial in 2008, 2009 and 2010.[79]

Regression model for fear of denial in the SSBF. Keen Independent conducted its own econometric analysis of fear of denial by developing a model to explore the relationships between fear of denial and the race/ethnicity and gender of businesses owners while statistically controlling for other factors. The model was similar to the probit regression for likelihood of denial except that the fear of denial model included business owners who did not apply for a loan and excluded loan characteristics.

After excluding observations where fear of denial was imputed, businesses where no individual held at least 10 percent ownership and businesses where the largest shareholders were firms, the 2003 national sample included 4,173 businesses (321 of which were in the Mountain region). Similar to the likelihood of denial model, Mountain region effects are modeled using regional control variables in the national model.[80]

Figure G-10 presents the marginal effects from the probit model predicting the likelihood that a business needs credit but will not apply for a loan due to fear of denial. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of forgoing application for a loan due to fear of denial.

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[76] Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

[77] Coleman, Susan. 2004. "Access to Debt Capital for Small Women- and Minority-Owned Firms: Does Educational Attainment Have an Impact?" *Journal of Developmental Entrepreneurship*. 9:127-144.

[78] Blanchflower et al., 2003. Discrimination in the Small Business Credit Market.

[79] Robb, Alicia. 2012. "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

[80] Again, Keen Independent considered an interaction variable to represent firms that are both minority and female but the term was not significant.

Factors that are associated with a *higher* likelihood of not applying for a loan due to fear of loan denial include:

- Firm bankruptcy in the past 7 years;
- The business owner having had a judgment against the business in the past 3 years;
- The business having a significant or high risk credit score;
- A larger percentage of business owned by the principal owner;
- The business having an existing mortgage, existing vehicle loans, existing loans from stockholders or other existing loans;
- Higher cost of doing business in the prior year;
- Having one or more delinquent business transactions (60 days or more) within the past 3 years; and
- Location in a metropolitan area.

Factors that are associated with a *lower* likelihood of not applying for a loan due to fear of loan denial include:

- The business owner being older and having a four-year college degree;
- More equity in the business owner's home — if he or she is a homeowner — and more business owner net worth (excluding the business owner's home);
- Being an older business;
- More sales or negative sales in the prior year;
- Being in the transportation, communications and utilities industry; and
- Having a local (as opposed to regional, national or international) sales market.

After statistically controlling for race- and gender-neutral influences, African American-owned firms and female-owned businesses were more likely to forgo applying for a loan due to fear of denial. Results for minority- and women-owned businesses within the Mountain region were not significantly different from the U.S. as a whole after accounting for other factors.

Figure G-10.
Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 2003 SSBF,
Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal Effect		Variable	Marginal Effect		Variable	Marginal Effect	
Race/ethnicity and gender			**Firm's characteristics, credit and financial health**			**Firm and lender environment and loan characteristics**		
African American	0.190	**	D&B credit score = moderate risk	-0.010		Partnership	0.002	
Asian American	0.058		D&B credit score = average risk	0.038		S corporation	0.012	
Hispanic American	0.066		D&B credit score = significant risk	0.045		C corporation	0.020	
Native American	0.019		D&B credit score = high risk	0.102	**	Construction industry	0.033	
Other minority	0.142		Total employees	0.000		Manufacturing industry	-0.016	
Female	0.031	*	Percent of business owned by principal	0.001	**	Transportation, communications and utilities industry	-0.049	**
Mountain region	0.019		Family-owned business	-0.012				
Minority in Mountain region	-0.054		Firm purchased	-0.010		Finance, insurance and real estate industries	0.038	
Female in Mountain region	0.038		Firm inherited	-0.034				
			Firm age	-0.003	**	Engineering industry	-0.029	
Owner's characteristics, credit and resources			Firm has checking account	0.008		Other industry	0.010	
Age	-0.002	**	Firm has savings account	0.014		Herfindahl index = .10 to .18	-0.006	
Owner experience	0.001		Firm has line of credit	-0.006		Herfindahl index = .18 or above	0.024	
Less than high school education	0.040		Existing capital leases	0.031		Located in MSA	0.047	**
Some college	-0.002		Existing mortgage for business	0.048	**	Sales market local only	-0.061	**
Four-year degree	-0.040	**	Existing vehicle loans	0.031	*			
Advanced degree	-0.024		Existing equipment loans	0.043				
Log of home equity	-0.004	**	Existing loans from stockholders	0.074	**			
Owner has negative net worth	-0.032		Other existing loans	0.105	**			
Bankruptcy in past 7 years	0.229	**	Firm used trade credit in past year	0.018				
Judgement against in past 3 years	0.276	**	Log of total sales in prior year	-0.021	**			
Log of net worth excluding home	-0.025	**	Negative sales in prior year	-0.091	**			
			Log of cost of doing business in prior year	0.012	*			
			Log of total assets	0.005				
			Log of total equity	-0.008				
			Firm bankruptcy in past 7 years	0.197				
			Firm delinquency in business transactions	0.145	**			

Note: * Statistically significant at 90% confidence level.
** Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using chi-square statistics from the probit coefficients associated with the marginal effects.

"Mining industry" and "Negative total assets" perfectly predicted loan outcome and dropped out of the regression; "Negative total equity" dropped because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

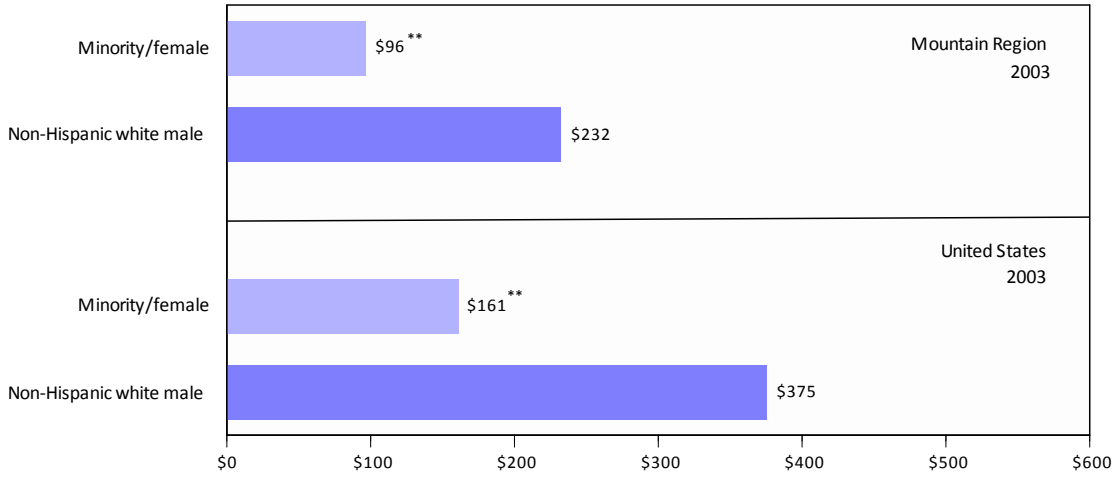
Loan values. Keen Independent also considered average loan values for businesses that received loans. Results from the 2003 SSBF for mean loan values issued to different racial/ethnic and gender groups are presented in Figure G-11.

Comparisons of loan amounts between non-Hispanic white male-owned businesses and minority- and women-owned businesses indicated the following:

- Among firms in the Mountain region that obtained loans, minority- and women-owned businesses received loans that averaged about $96,000. Majority-owned firms received loans that averaged about $232,000. In sum, minority- and women-owned firms received loans that, on average, were less than one-half the size of loans received by majority-owned firms.

- The disparity in average loan value for minority- and women-owned firms was also evident for the nation, as shown below.

Figure G-11.
Mean value of approved business loans, in thousands, 2003



Note: ** Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

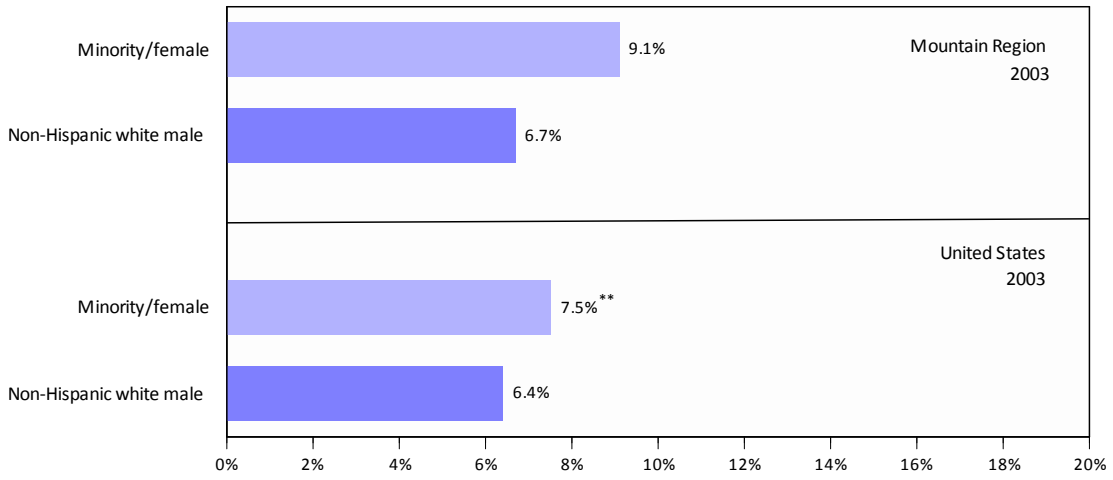
Previous national studies have found that African American-owned businesses are issued loans that are smaller than loans issued to non-Hispanic white-owned businesses with similar characteristics. Examination of construction companies in the United States have also revealed that African American-owned businesses are issued loans that are worth less than loans issued to businesses with otherwise identical characteristics.[81]

Keen Independent conducted further econometric analysis to explore the relationships between loan amounts and the race/ethnicity and gender of business owners while statistically controlling for other factors but the results were not conclusive.

[81] Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

Interest rates. Figure G-12 presents average interest rates on commercial loans received by the race/ethnicity of business owners, based on 2003 SSBF data. In 2003, the average interest rate on loans issued to minority- and women-owned businesses in the United States appeared to be higher (by 1.1 percentage points) than the mean interest rate of loans for non-Hispanic white male-owned businesses. A greater disparity is reflected in the Mountain region data (2.4 percentage points). Due to small sample size, the difference for businesses in the Mountain region was not statistically significant.

Figure G-12.
Mean interest rate for business loans, 2003



Note: ** Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2003 Survey of Small Business Finances.

Other researchers' regression analyses of interest rates. Previous studies have investigated differences in interest rates across race/ethnicity and gender while statistically controlling for factors such as individual credit history, business credit history, and Dun and Bradstreet credit scores. Findings from those studies include the following:

- Hispanic American-owned businesses had significantly higher interest rates for lines of credit in places with less credit market competition. However, the study found no evidence that African American- or female-owned businesses received higher rates.[82]

- Among a sample of businesses with no past credit problems, African American-owned businesses had significantly higher interest rates on approved loans than other groups.[83]

Regression model for interest rates in the SSBF. Keen Independent conducted a regression analysis using data from the 2003 SSBF to explore the relationships between interest rates and the race, ethnicity and gender of business owners. The study team developed a linear regression model using the same control variables as the likelihood of denial model along with additional characteristics of

[82] Cavalluzzo. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."
[83] Blanchflower. 2003. "Discrimination in the Small Business Credit Market."

the loan received, such as whether the loan was guaranteed, if collateral was required, the length of the loan, and whether the interest rate was fixed or variable.

The national sample for analysis of interest rates included 1,474 businesses that received a loan in the previous three years and the Mountain region included 120 such businesses.[84] Again, Mountain region effects were modeled using regional control variables.[85]

Figure G-13 presents the coefficients from the linear regression model. The results indicate that a number of race- and gender-neutral factors have a statistically significant effect on interest rates, including the following factors:

- Business owner having negative net worth is associated with a higher interest rate;
- High risk credit scores are associated with higher interest rates (by approximately 1 percentage point);
- Higher total business equity is associated with higher interest rates;
- Being in the transportation, communications, and utilities industry is associated with higher interest rates;
- Higher business owner net worth (excluding home value) is associated with a higher interest rate;
- A higher Herfindahl index is associated with a higher interest rate;
- Vehicle loans and loans for purposes other than equipment, capital lease and business mortgage are associated with lower interest rates;
- Loans requiring a collateral are associated with lower interest rates;
- Longer loans are associated with lower interest rates; and
- Fixed rate loans are associated with higher interest rates than variable rate loans.

After statistically controlling for race- and gender-neutral influences, the study team observed that African American-owned businesses received loans with interest rates approximately 2 percentage points higher than non-Hispanic white-owned businesses. Hispanic American-owned businesses received loans with interest rates approximately 1 percentage point higher than non-Hispanic white-owned businesses. These differences were statistically significant.

Being in the Mountain region did not have a statistically significant impact on interest rates.

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[84] After excluding a small number of observations where the interest rate was imputed.

[85] Keen Independent considered an interaction variable to represent businesses that are both minority- and female-owned but the term was not significant.

Figure G-13.
Interest rate (linear regression) in the U.S. in the 2003 SSBF,
Dependent variable: interest rate on most recent approved loan

Variable	Coefficient		Variable	Coefficient		Variable	Coefficient	
Race/ethnicity and gender			**Firm's characteristics, credit and financial health**			**Firm and lender environment and loan characteristics**		
Constant	10.360	**	D&B credit score = moderate risk	0.120		Partnership	-0.416	
African American	2.283	*	D&B credit score = average risk	-0.001		S corporation	-0.211	
Asian American	0.507		D&B credit score = significant risk	0.128		C corporation	-0.145	
Hispanic American	1.119	**	D&B credit score = high risk	0.756	**	Mining industry	0.195	
Native American	-0.398		Total employees	-0.002		Construction industry	-0.554	*
Other minority	-0.910		Percent of business owned by principal	0.001		Manufacturing industry	-0.130	
Female	-0.129		Family-owned business	-0.501		Transportation, communications and utilities industry	1.445	**
Mountain region	0.361		Firm purchased	-0.050				
Minority in Mountain region	-0.508		Firm inherited	-0.040		Finance, insurance and real estate industries	-0.076	
Female in Mountain region	-0.041		Firm age	-0.012				
			Firm has checking account	0.033		Engineering industry	0.516	
Owner's characteristics, credit and resources			Firm has savings account	0.043		Other industry	0.437	
Age	-0.008		Firm has line of credit	-0.098		Herfindahl index = .10 to .18	0.785	
Owner experience	0.006		Existing capital leases	0.149		Herfindahl index = .18 or above	1.045	*
Less than high school education	0.453		Existing mortgage for business	0.003		Located in MSA	0.177	
Some college	0.437		Existing vehicle loans	0.338		Sales market local only	-0.098	
Four-year degree	-0.198		Existing equipment loans	0.532		Approved Loan amount	0.000	
Advanced degree	-0.440		Existing loans from stockholders	0.175		Capital lease application	1.093	
Log of home equity	0.018		Other existing loans	0.422		Business mortgage application	0.539	
Owner has negative net worth	2.525	**	Firm used trade credit in past year	0.187		Vehicle loan application	-1.123	**
Bankruptcy in past 7 years	0.307		Log of total sales in prior year	-0.141		Equipment loan application	-0.205	
Judgement against in past 3 years	-0.156		Negative sales in prior year	-1.528		Loan for other purposes	-0.245	
Log of net worth excluding home	-0.122	*	Log of cost of doing business in prior year	-0.115		Loan guaranteed	-0.365	
			Log of total assets	-0.179		Collateral required	-0.894	**
			Log of total equity	0.216	**	Length of loan (months)	-0.004	**
			Firm bankruptcy in past 7 years	-0.401		Fixed rate	1.163	**
			Firm delinquency in business transactions	-0.159				

Note: * Statistically significant at 90% confidence level.
** Statistically significant at 95% confidence level.

"Owner has negative net worth" and "Negative total assets" dropped out of the regression because of collinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

Small business lending after the Great Recession. The financial landscape has changed substantially since the beginning of the Great Recession. Bank lending fell significantly from the end of 2008 through 2010. Data from the Federal Reserve show commercial and industrial loans and leases peaked at $1.6 trillion at the end of 2008 and fell to $1.2 trillion by the end of 2010, a decline of about 25 percent.[86] Similar analyses show declines in small commercial and industrial loans and leases (less than $1 million). The amount of outstanding small loans and leases in the fourth quarter of 2012 was 22 percent below the amount at the second quarter of 2007.[87]

Bank tightening of lending standards has been greater for small businesses in recent years. While net tightening (percentage of banks tightening standards minus the percentage loosening standards) was positive for small and large loans in 2008 through 2010, in 2011 and 2012 positive net tightening existed only for small business loans. This tightening of the lending markets may have several effects on small businesses, including fewer startups as well as slower economic and employment growth for those already in existence. Longer term trends in small business financing may exacerbate recent economic disturbances. Data from the Federal Deposit Insurance Corporation (FDIC) show the share of all nonfarm, nonresidential loans of less than $1 million has been declining since 1995.[88]

Characteristics of small businesses loans after the Great Recession. Research shows characteristics of small business loans have changed. The average small business loan has more than doubled since 2005, to about $425,000. Qualitative research suggests this trend toward larger loans may be due to a greater push for profit maximization in the banking industry.[89] This may affect some minority business owners, particularly African American business owners. About 80 percent of African Americans that apply for SBA loans seek $150,000 or less.[90]

Characteristics of small businesses after the Great Recession. Characteristics of small businesses have also changed considerably since 2007. Significantly fewer small businesses reported "good" cash flow in 2013 compared to 2007 (65 and 48 percent, respectively). Small business delinquencies have risen and consequently, more lending requires collateral. About 90 of small business lending in 2013 required some collateral, up from 84 percent in 2007. During this same period, the decline in housing prices nationwide has weakened owner net equity and made collateral requirements more difficult to meet.[91]

Small business lending by race/ethnicity. In fiscal year 2013, the U.S. Small Business Administration (SBA) administered about $23 billion in loans. Loans to African American business owners represented $382 million or 1.7 percent of the total, a substantial decline from 2008, when SBA allocated about 8 percent of total loan value to African American business owners. Hispanic

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[86] U.S. Board of Governors of the Federal Reserve System. 2014. "H.8 Assets and Liabilities of Commercial Banks in the United States." Accessed Jun 15, 2014 from FRASER, http:fraser.stlouisfed.org/publication/.

[87] Ann Marie Wiersch and Scott Shane. 2013. "Why Small Business Lending Isn't What It Used to Be." Economic Commentary. Federal Reserve Bank of Cleveland.

[88] Ibid.

[89] CITI Group, once SBA's top lender, no longer administers SBA loans. Other banks, including Bank of America, have significantly reduced SBA lending.

[90] Ruth Simon and Tom McGinty. 2014. "Loan Rebound Misses Black Businesses." *The Wall Street Journal.* 14 March 2014.

[91] Ibid., 87.

American business owners received 4.7 percent of the loan total in 2013, relatively unchanged from 4.5 percent of the loan total in 2009.[92]

Results from Keen Independent 2014 availability interviews with firms in the Montana transportation contracting industry. At the close of the 2015 availability interviews conducted as part of the MDT disparity study, the study team asked questions regarding potential barriers or difficulties the firm might have experienced in the Montana marketplace. The series of questions was introduced with the following statement: "Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past five years as you answer these questions." Respondents were then asked about specific potential barriers or difficulties.

For each potential barrier, the study team examined whether responses differed between minority-, women- and majority-owned firms (which are companies not owned by minorities or women). Figure G-14 on the following page presents results for questions related to access to capital, bonding and insurance. (Note that the number of MBE respondents is small.)

Access to lines of credit and loans. The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As shown in Figure G-14, 17 percent of minority-reported difficulties in obtaining lines of credit or loans, higher than the share of WBEs (9%) and majority-owned firms (8%) indicating that this was a problem.

Receiving timely payment. Need for business credit is, in part, linked to whether firms are paid for their work in a timely manner. In the availability interviews, Keen Independent asked, "Has your company experienced any difficulties receiving payment in a timely manner?" Figure G-14 shows that more than one-third of minority-owned firms reported difficulties receiving payment in a timely manner, somewhat higher than WBEs and majority-owned firms.

Bonding and Insurance

Bonding is closely related to access to capital. Some national studies have identified barriers regarding MBE/WBEs and access to surety bonds for public construction projects.[93]

Bonding. To research whether bonding represented a barrier for Montana businesses, Keen Independent asked firms completing availability interviews:

- "Has your company obtained or tried to obtain a bond for a project?"
- [and if so] "Has your company had any difficulties obtaining bonds needed for a project?"

Figure G-14 presents these results from the 2015 availability interviews. About one-half of MBE/WBEs and majority-owned firms had obtained or tried to obtain a bond for a project, similar among MBEs, WBEs and majority-owned firms. Among those firms, 20 percent of minority- and women-owned firms reported experiencing difficulties obtaining bonds needed for a project.

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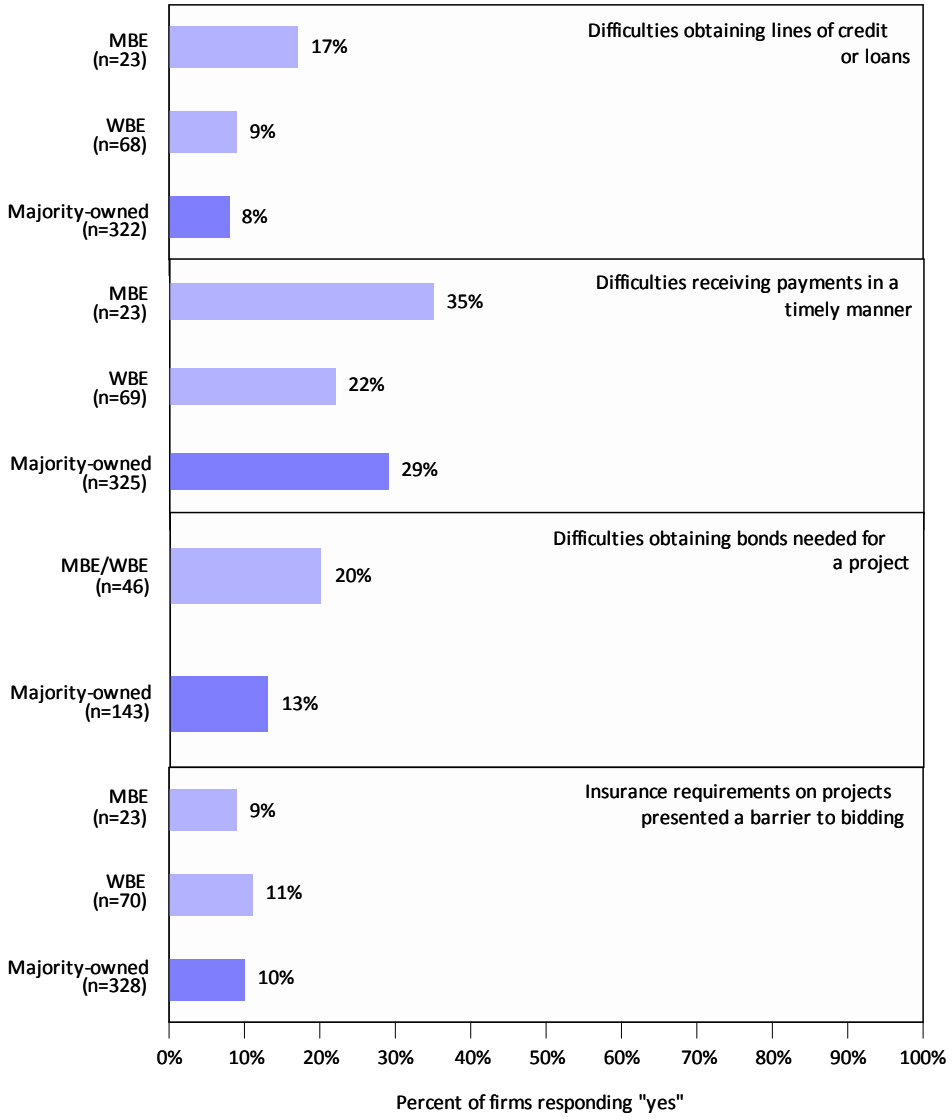
[92] Ibid., 90.

[93] For example, Enchautegui, Maria E. et al. 1997. "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?" *The Urban Institute:* 1-117, p. 56.

Relatively fewer majority-owned firms (13%) reported difficulties obtaining the bonding needed for a project.

Figure G-14.
Responses to 2015 availability interview questions concerning loans, timely payments, bonding and insurance, Montana MBE/WBEs and majority-owned firms



Source: Keen Independent Research from 2015 availability interviews.

Insurance. The study team also examined whether minority- and women-owned firms were more likely than majority-owned firms within the study area to report that "insurance requirements represented a barrier to bidding" (see Figure G-14).

About one-in-ten MBEs, WBEs and majority-owned firms interviewed indicated that insurance requirements on projects have presented a barrier to bidding. Results were similar for MBEs, WBEs and majority-owned businesses.

Summary

There is evidence that minorities and women 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 businesses with less capital. A number of studies have demonstrated that lower startup capital adversely affects prospects for those businesses. Key results included the following.

Home equity is an important source of funds for business startup and growth. There are disparities in access to this source of capital for minority groups in Montana.

- Fewer African Americans, Asian Americans, Hispanic Americans and Native Americans in Montana own homes compared with non-Hispanic whites. These differences in homeownership rates were present prior to the Great Recession and persisted in 2008 through 2012.

- Native Americans and Hispanic Americans in Montana who do own homes tend to have lower home values than non-Hispanic whites. These differences were evident before and after the Great Recession.

- In 2007, high-income Asian Americans, Hispanic Americans and Native Americans applying for home mortgages in Montana were more likely than high-income non-Hispanic whites to have their applications denied. Except for Hispanic Americans, these disparities were also evident in 2013.

- Compared with non-Hispanic whites, subprime loans represented a greater proportion of 2007 Montana conventional home purchase loans for Hispanic Americans and Native Americans. Although the share of loans that were subprime dropped for other groups by 2013, it increased to 29 percent of conventional home purchase loans for Native Americans. Disparities in use of subprime loans also persisted for Hispanic Americans in Montana in 2013.

- Compared with non-Hispanic whites, subprime loans were also a greater proportion of conventional home refinance loans for Asian Americans, Hispanic Americans and Native Americans in Montana in 2007. (By 2013, very few conventional refinance loans for any group were subprime.)

There is also evidence of disparities for minority- and women-owned firms concerning business loans in the Mountain region.

- Based on 2003 Survey of Small Business Finances data for the Mountain region, more minority- and women-owned small businesses were denied loans than non-Hispanic male-owned small businesses. There is evidence that African American small business owners were more likely to have been denied business loan applications than similarly situated non-Hispanic whites (disparity index of 78).

- Among small business owners who reported needing business loans, minority and female business owners in the Mountain region were nearly twice as likely as non-Hispanic white men to report that they did not apply due to fear of denial. There is evidence that African Americans and women were more likely to forgo applying for loans due to fear of denial compared with similarly-situated non-minorities and men.

- The mean value of approved loans for minority- and female-owned businesses in the Mountain region was less than one-half that for non-Hispanic white male-owned firms.

- There is evidence that minority- and women-owned small businesses in the Mountain region paid higher interest rates on their business loans than non-minority male-owned small businesses.

- The 2015 availability interviews conducted as part of this study indicated that minority-owned firms were twice as likely as majority-owned firms to report experiencing difficulties in obtaining lines of credit or loans.

Because of the importance of access to capital to start, sustain and expand businesses, any evidence of unequal access to capital for minorities or women, or minority- and women-owned businesses, can affect the number and strength of minority- and women-owned firms in the marketplace. There is strong evidence of such disparities regarding business loans for minority- and women-owned firms in the Mountain region and access to home equity and home mortgages for minority groups in Montana.

Closely related to access to capital is bonding on public sector projects. About one-half of the minority- and women-owned firms and the majority-owned firms in the 2015 availability interviews indicated that they had obtained or sought bonding. Among those businesses, minority- and women-owned firms were substantially more likely than majority-owned firms to report difficulties obtaining bonds needed for projects. This can affect the opportunities for minority- and women-owned firms to compete in the Montana construction marketplace, especially for construction prime contracts from public agencies such as MDT.

APPENDIX H.
Success of Businesses in the Montana Construction and Engineering Industries

Keen Independent examined the success of minority- and women-owned business enterprises (MBE/WBEs) in the Montana construction and engineering industries. Keen Independent assessed whether business outcomes for MBEs and WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).[1]

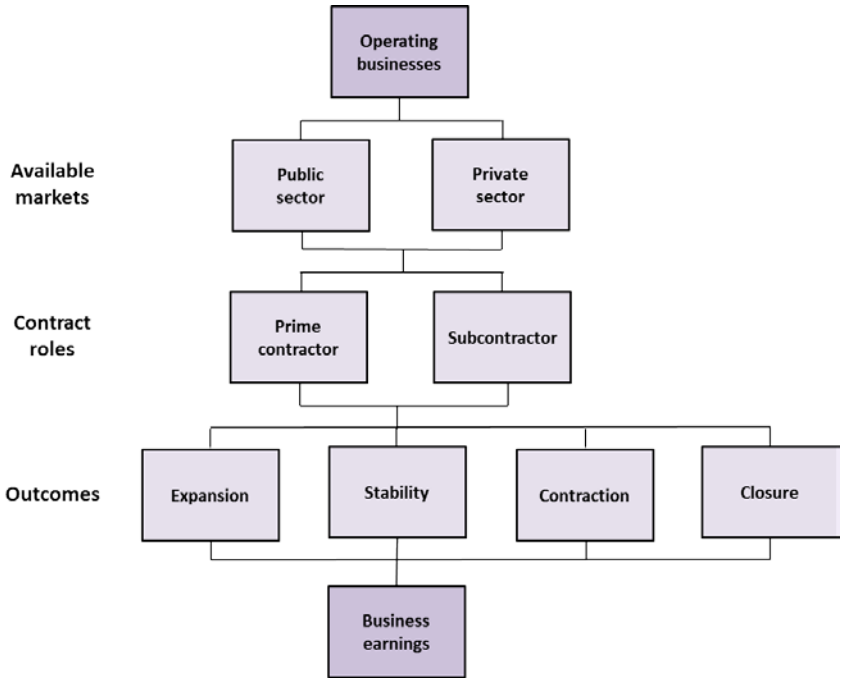
Keen Independent researched outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Participation in public and private sector markets, including contractor roles and sizes of contracts bid on and performed;
- Business closures, expansions, and contractions;
- Business receipts and earnings; and
- Potential barriers to starting or expanding businesses.

Figure H-1 provides a framework for Keen Independent's analyses.

Figure H-1.
Business
outcomes

Source:
Keen Independent
Research



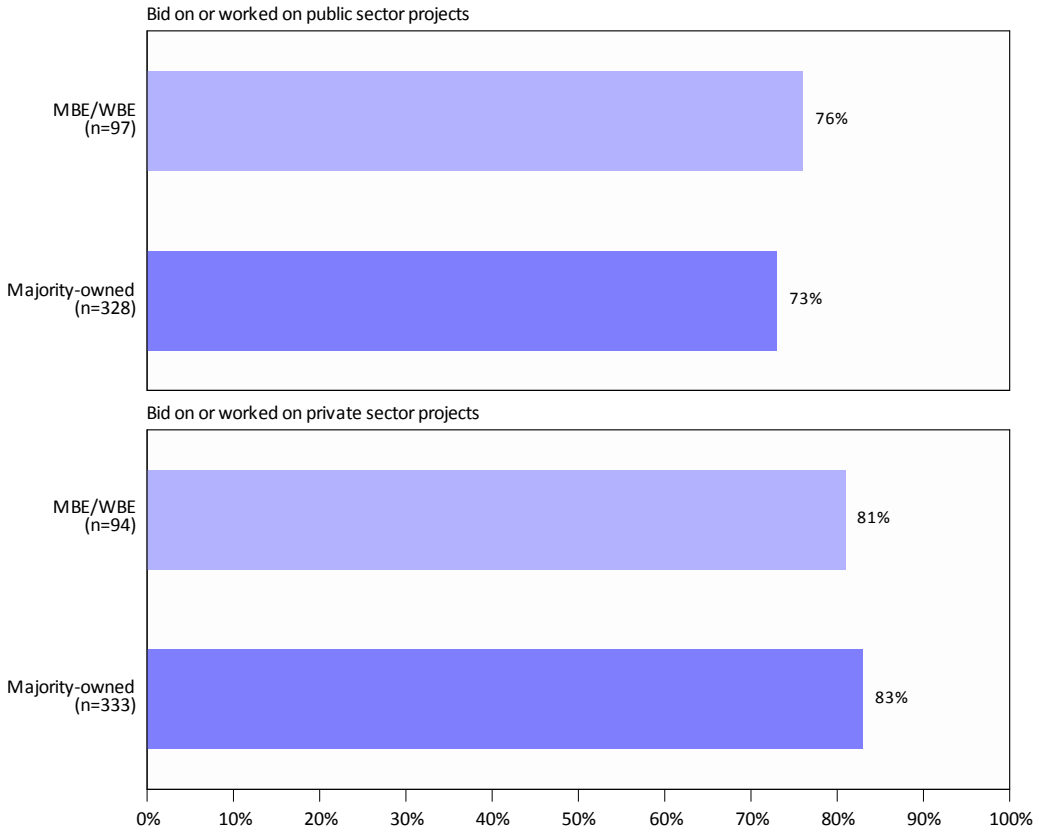
[1] Keen Independent uses the terms "MBEs" and "WBEs" to refer to businesses that are owned and controlled by minorities or women (definitions listed in Appendix A), regardless of whether they are certified or meet the revenue and net worth requirements for DBE certification and regardless of whether they are certified as MBEs or WBEs.

Participation in Public and Private Sector Markets, Contract Roles and Bid Capacity

Keen Independent used information collected as part of the 2015 availability analysis to examine whether transportation-related construction and engineering businesses bid on public sector and private sector work, and the extent to which firms work as prime contractors and subcontractors. The study team also examined the largest contracts received or bid ("bid capacity" as used in this study).

Bidding on public sector projects and private sector projects. In the availability interviews, the study team asked firms that reported that they performed transportation-related work whether they had bid on or worked on any part of a public sector project within Montana in the past five years.[2] About the same proportion of MBE/WBEs (76%) as majority-owned firms (73%) responding to the availability survey indicated that they had bid on or worked on a public sector contract.

Figure H-2.
Percent of businesses in the transportation contracting industry that reported bidding or working on public sector and/or on private sector projects in Montana in the past five years



Source: Keen Independent Research from 2015 availability interviews.

[2] Keen Independent deemed a business to have performed or bid on public sector work if it answered "yes" to either of the following questions in availability interviews: (a) "During the past five years, has your company submitted a bid, price quote or proposal for any part of a contract for a state or local government agency in Montana?"; or (b) "During the past five years, has your company worked on any part of a contract for a state or local government agency in Montana?" Similar questions pertained to private sector work.

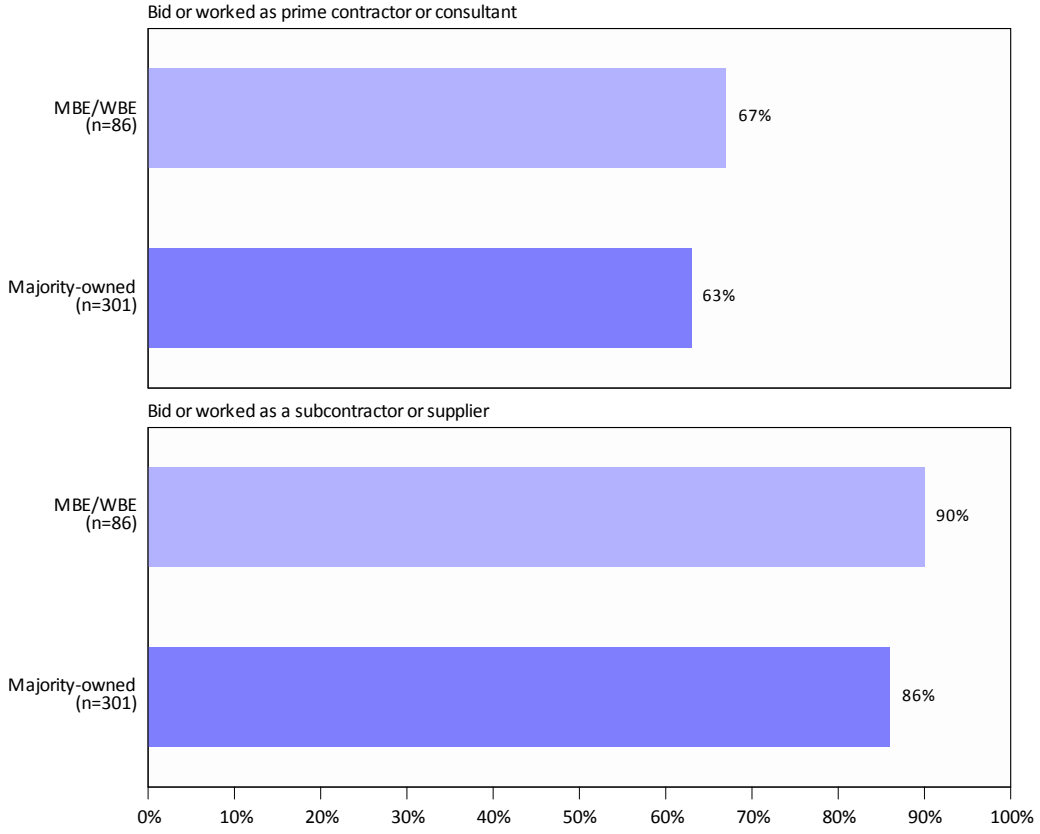
Keen Independent also asked businesses involved in transportation work if they had bid on or worked on private sector work in Montana in the past five years (any part of a project). Again, responses of MBE/WBEs and majority-owned firms were similar — about 80 percent of MBE/WBEs and majority-owned firms had done so.

The results in Figure H-2 indicate that most transportation-related firms in Montana pursue both public and private sector work. As discussed in Appendix J, the study team in-depth, personal interviews with businesses and trade associations in Montana confirmed that companies performing transportation contracts in Montana usually pursue both public and private sector contracts.

Bidding as a prime contractor and as a subcontractor or supplier. The study team also asked firms involved in transportation-related work whether they had been awarded work or bid on work as a prime contractor or prime consultant within Montana in the past five years. About two-thirds of MBE/WBEs and majority-owned firms reported bidding or receiving work as a prime contractor, as presented in Figure H-3.

About 90 percent of MBE/WBEs and majority-owned firms indicated that they had been awarded or bid on work as a subcontractor or supplier. As with bidding on public sector and private sector work, there was little difference in results for bidding as a prime contractor versus as a subcontractor between MBE/WBEs and majority-owned firms in Montana.

Figure H-3.
Percent of businesses in the transportation contracting industry that reported bidding or working as a prime contractor and/or as a subcontractor on a project in Montana in the past five years



Source: Keen Independent Research from 2015 availability interviews.

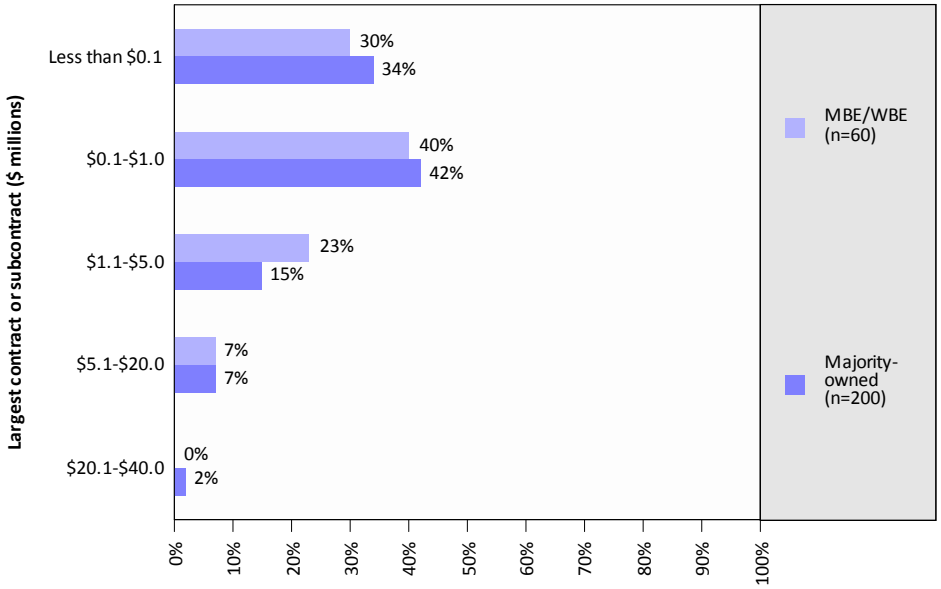
Availability interview results also indicate that firms working as prime contractors often also function as subcontractors (and vice versa). In-depth interviews with business owners confirmed that result.

Largest road-, highway- or bridge-related contract bid on or received in Montana in the past five years. As part of the availability interviews, the study team asked businesses to identify the largest road-, highway- or bridge-related contract or subcontract they were awarded or had bid on in Montana in the past five years.

Figure H-4 examines firms' responses to the question concerning the largest contract they had bid on or been awarded. Most MBE/WBE and majority-owned companies indicated that the largest contracts or subcontracts they had bid on or been awarded were less than $100,000 (30% of firms) or from $100,000 to $1 million (40% of companies). Relatively more majority-owned firms reported that their largest contract bid on or received was either less than $100,000 (34%) or $100,000 to $1 million (42%).

These results indicate that most MBE/WBEs (70%) and majority-owned firms (76%) bid on contracts of no greater than $1 million. However, relatively more MBE/WBEs bid on contracts greater than $1 million (31%) than majority-owned firms (24%) in the Montana transportation contracting industry. Even so, none of the MBE/WBEs interviewed indicated that they had received or bid on contracts more than $20 million, while 2 percent of majority-owned firms indicated that they had.

Figure H-4.
Largest road-, highway-, or bridge-related contract or subcontract that businesses bid or received in Montana in the past five years



Source: Keen Independent Research from 2015 availability interviews.

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.[3] One approach to account for differing capacities among different types of businesses is to examine relatively small contracts, a technique noted in *Rothe Development Corp. v. U.S. Department of Defense*. In addition to examining size of contracts, Keen Independent directly measured bid capacity in its availability analysis.[4]

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., "bid capacity" as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Measurement of bid capacity. 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 five years preceding when Keen Independent interviewed it.

Subindustries such as elevated highway and bridges tend to involve relatively large projects. Other subindustries, such as surveying, typically involve smaller projects. Figure H-5 reports the median relative bid capacity among Montana transportation-related businesses in 21 subindustries. Results categorized companies according to their primary line of business (e.g., results for a firm that primarily performs excavation that also does trucking and hauling are included under excavation, grading and drainage).[5]

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[3] 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).*

[4] See Appendix D for details about the availability interview process.

[5] Only subindustries with a minimum of three respondents in the availability interviews were analyzed.

Figure H-5.
Median relative bid capacity by subindustry, 2015

Subindustry	Median bid capacity
Construction	
Bridge and elevated highway construction	$1 million to $2 million
Temporary traffic control	$1 million
Pavement surface treatment (such as sealing)	$1 million
Striping or pavement parking	$500,000 to $1 million
General road construction and widening	$500,000
Concrete cutting	$500,000
Underground utilities	$500,000
Asphalt and concrete paving	$100,000 to $500,000
Excavation, site prep, grading and drainage	$100,000 to $500,000
Drilling and foundations	$100,000 to $500,000
Electrical work including lighting and signals	$100,000 to $500,000
Concrete flatwork (including sidewalk, curb and gutter)	$100,000 to $500,000
Other concrete work	$100,000 to $500,000
Stuctural steel work	$100,000 to $500,000
Engineering-related	
Engineering	$500,000
Transportation planning	$500,000
Inspection and testing	$100,000 to $500,000
Environmental consulting	$100,000 or less
Surveying and mapping	$100,000 or less
Geotechnical engineering and consulting	$100,000 or less
Other engineering-related work	$100,000 or less

Source: Keen Independent Research from 2015 Availability Interviews.

Comparison of MBE/WBE and majority-owned bid capacity for transportation construction. Keen Independent examined whether there were differences in the size of the largest contracts for MBEs, WBEs and majority-owned firms within the same subindustries.

- First, the study team determined for each company whether its largest contract or subcontract (awarded or bid on) was higher than the median for its primary line of business. For example, if the median bid capacity category for a subindustry was $1-2 million, and a firm's largest contract was more than $2 million, it was classified as having "above-median bid capacity."

- Keen Independent then calculated the percentage of MBEs, WBEs and majority-owned firms that had above-median bid capacity for their subindustry. Figure H-6 reports results for construction subindustries and engineering-related subindustries.

For 40 percent of MBE/WBE construction and engineering businesses, the largest contract bid on or awarded was higher than the median for its subindustry, about the same as for majority-owned construction businesses (36%). There is no indication, overall, that minority- and women-owned firms have lower bid capacity than majority-owned firms in Montana after controlling for subindustry.

Figure H-6.
Proportion of MBE and majority-owned firms in the Montana transportation contracting industry with above-median bid capacity, 2015

Source:
Keen Independent Research from 2015 availability interviews.

Firm	Construction and Engineering
MBE/WBE	40 %
Majority-owned	36

Regression analysis that considered age of firm and the whether the firm was minority- or women-owned found that older firms were more likely to have above-median bid capacity. There was no statistically significant effect of minority or female ownership.

Summary of markets, contracting roles and bid capacity. Availability interview results show that most firms in the Montana transportation contracting industry pursue both public and private sector work. There was little difference in results for MBE/WBEs and majority-owned firms. Similarly, many companies work as prime contractors or consultants (MBE/WBEs and majority-owned firms alike), and about 90 percent work as subcontractors or suppliers (also no difference between MBE/WBEs and majority-owned firms). This considerable cross-over between public and private sector work and from subcontractor to prime contractor roles was confirmed in in-depth interviews with business owners and trade associations (see Appendix J).

Relatively few firms in the Montana transportation contracting industry obtained or bid on prime contracts or subcontracts larger than $1 million. However, MBE/WBEs were somewhat more likely to have received or bid on large contracts than majority-owned firms (but not contracts in the $20 million or greater range). Further analysis of bid capacity indicated that the largest contracts or subcontracts MBEs and WBEs have bid on or been awarded were no smaller than majority-owned firms in the same subindustries. Age of firm and its primary line of work, not whether it was minority- or women-owned, were the primary determinants of "bid capacity" in this analysis.

Business Closures, Expansions, and Contractions

A 2010 SBA report investigated business dynamics for the 2002 through 2006 time period for minority-owned and white-owned businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989-2006 Business Information Tracking Series, the SBA reported on business closures, expansions and contractions between 2002 and 2006 across different sectors of the economy.[6,7] The SBA examined differences in outcomes by race and ethnicity, but not gender.

Business closures. High rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closures in Montana. The 2010 SBA report analyzed business closure rates between 2002 and 2006 for minority- and white-owned firms in Montana. Figure H-7 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses.

- About 35 percent of African American-owned businesses that were operating in Montana in 2002 had closed by the end of 2006, a higher rate than for white-owned businesses (27%).
- Nearly one-half of Asian American-owned businesses that were operating in Montana in 2002 had closed by the end of 2006, almost double the rate for white-owned businesses.
- Closure rates for Hispanic American-owned businesses (20%) were lower than for white-owned firms.

The bottom of Figure H-7 compares results for female- and male-owned firms in Montana. There was little difference in closure rates based on gender from 2002 to 2006.

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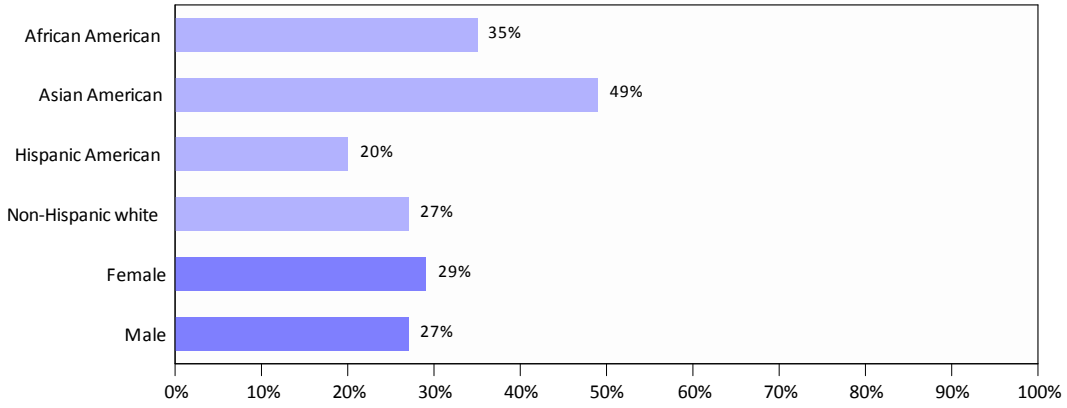
[6] Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

[7] Businesses classifiable by race/ethnicity exclude publicly-traded companies. Keen Independent did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

Figure H-7.
Rates of business closure in Montana, 2002 through 2006



Note: Data refer to non-publicly-held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

Rates of business closures by industry. Data for the construction and professional services industries were not available by state. The SBA analysis only reported industry-specific results for the nation as a whole. Based on national results, 43 percent of African American-owned construction businesses that were operating in 2002 had closed by 2006, higher than the rate for white-owned construction companies. Among professional, scientific, and technical services firms, relatively more African American-owned businesses closed than white-owned firms.

Hispanic American-owned businesses and Asian American-owned construction businesses that were operating in 2002 were also more likely than white-owned companies to have closed by 2006. This was also found in the professional, scientific, and technical services industry.

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.[8] 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.

[8] 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.

Keen Independent examined CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction; professional, scientific, and technical services; and all industries.[9, 10] According to CBO data, African American-owned businesses were the most likely to report being "unsuccessful" at the time their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by "other minority groups" (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

In the construction industry, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58%). Those trends were similar in the professional services industry with one exception — women-owned businesses (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

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 are largely due to barriers in access to capital.[11] 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 found to be particularly acute for minority-owned businesses in the construction industry.[12]
- 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.[13] Similar research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.[14]

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[9] 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 did 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.

[10] 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.

[11] Access to capital is discussed in greater detail in Appendix G.

[12] 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.

[13] 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.

[14] Fairlie, R. and A. Robb. 2009. "Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey." University of California, Santa Cruz.

- 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.[15]
- 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.[16]
- 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.[17]

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.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Montana businesses that expanded and contracted between 2002 and 2006. Figure H-8 presents the percentage of all Montana businesses, by race/ethnicity of ownership that increased their total employment between 2002 and 2006.

Results for Montana from the SBA study indicate that a smaller percentage of African American-owned businesses (6%) expanded between 2002 and 2006 compared with white-owned businesses (30%). Relatively more Asian American-owned businesses expanded (33%) compared to white-owned businesses. About one-half of Hispanic-owned businesses (46%) reported expansion, higher than the results for white-owned businesses.[18]

Women-owned firms in Montana were more likely than male-owned firms to expand during this time period.

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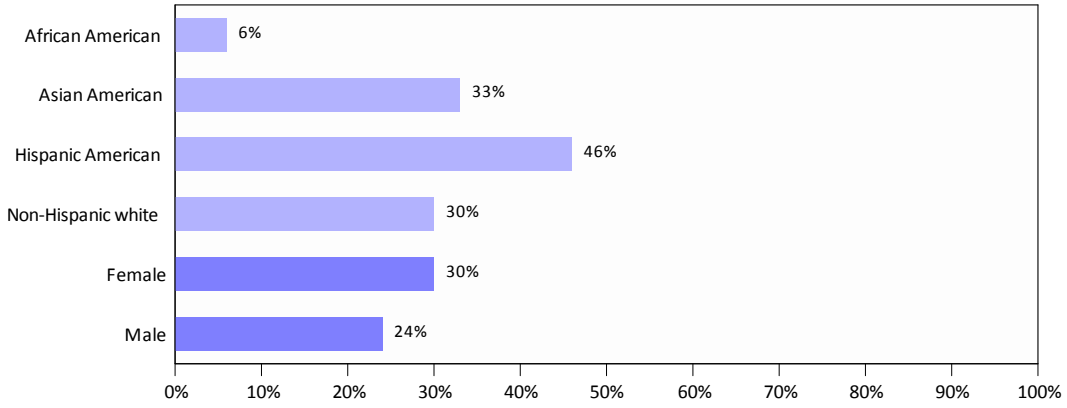
[15] Ibid.
[16] Bates, Timothy. 2002. "Analysis of Young Small Businesses That Have Closed: Delineating Successful from Unsuccessful Closures." Center for Economic Studies, U.S. Census Bureau.
[17] Bates, Timothy. 1993. "Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses." Center for Economic Studies, U.S. Census Bureau.
[18] Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Figure H-8.
Percentage of businesses in Montana that expanded, 2002 through 2006



Note: Data refer to non-publicly-held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

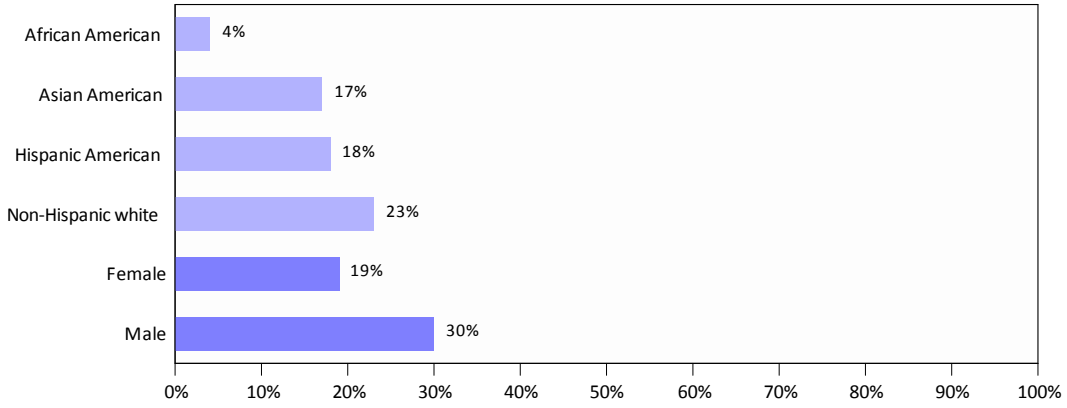
Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

The 2010 SBA study did not report state-level results for individual industries. For the nation, African American-owned construction and professional, scientific, and technical services businesses were less likely than white-owned businesses to have expanded between 2002 and 2006. Hispanic American- and Asian American-owned companies in both construction and professional, scientific, and technical services were slightly more likely than white-owned businesses to have expanded between 2002 and 2006.

Contractions. Figure H-9 shows the percentage of businesses operating in 2002 that reduced their employment (i.e., contracted) between 2002 and 2006 in Montana. About 23 percent of white-owned firms contracted during this period. These rates were lower for each minority group, with only 4% of African American owned businesses contracting, 17% for Asian-American owned businesses and 18% for Hispanic-American owned businesses. In part, the low rate for African American-owned firms might be due to more outright closures of those firms (see Figure H-7).

Women-owned firms were less likely than male-owned firms to contract in Montana between 2002 and 2006.

Figure H-9.
Percentage of businesses in Montana that contracted, 2002 through 2006



Note: Data refer to non-publicly-held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

The SBA study did not report state-specific results relating to contractions in individual industries. Based on national data, a slightly smaller percentage of African American-, Hispanic American- and Asian American-owned construction and professional, scientific, and technical services businesses contracted between 2002 and 2006 compared to white-owned businesses.

Summary of business closure, expansion and contraction. The following conclusions can be made based on U.S. Small Business Administration analyses for 2002 to 2006 for Montana:

- African American-owned businesses were more likely to close and less likely to expand than white-owned businesses.
- Asian American-owned businesses were considerably more likely to close than white-owned businesses.
- Hispanic American-owned businesses were less likely to close and more likely to expand than white-owned firms for those years.
- Women-owned firms were more likely to expand and less likely to contract than male-owned firms in Montana from 2002 to 2006.

Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. Keen Independent used several different data sources, including:

- Business receipts data from the U.S. Census Bureau 2007 Survey of Business Owners;
- Business earnings data for business owners from the 2000 Census and 2008-2012 American Community Survey (ACS); and
- Annual revenue data for Montana transportation construction and engineering businesses that the study team collected as part of availability interviews.

Business receipts. Keen Independent examined receipts for construction and professional, scientific and technical services businesses in Montana using data from the 2007 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau. The 2007 SBO reports business receipts separately for "employer" firms (i.e., those with paid employees other than the business owner and family members) and for all businesses.[19]

Figure H-10 presents mean annual receipts in 2007 (in thousands of dollars) for construction and for professional, scientific, and technical services businesses. The first column of results for "all firms" pertains to construction businesses, including employer firms and non-employer businesses. The second column presents results for professional, scientific and technical services firms in Montana, including both employers and non-employers. The final two columns provide mean receipts for employer firms (companies with paid employees).

Figure H-10.
Mean annual receipts (thousands) for businesses in the construction and professional, scientific and technical services industries, by race/ethnicity and gender of owners, Montana, 2007

	All firms		Employer firms	
	Construction	Professional, scientific and technical services	Construction	Professional, scientific and technical services
Asian American	$326	$140	$2,643	$1,592
Hispanic American	N/A	$58	N/A	$197
American Indian and Alaska Native	$195	$41	$964	$415
Non-Hispanic white	$307	$169	$905	$577
Female	$296	$65	$1,081	$296
Male	$297	$225	$976	$724

Notes: 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: 2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

[19] The data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.

Construction. In the Montana construction industry, average 2007 receipts for minority-owned firms differed from the average for non-Hispanic white-owned businesses ($307,000). Results for all businesses (i.e., employer and non-employer businesses combined) indicate that:

- Average receipts of Asian American-owned construction businesses ($326,000) were higher than those of non-Hispanic white-owned construction businesses in Montana;
- Average receipts of American Indian- and Alaska Native-owned construction businesses ($195,000) were less than two-thirds that of non-Hispanic white-owned construction businesses; and
- Average receipts for women-owned construction businesses in Montana ($296,000) were about the same as the average for male-owned businesses ($297,000).

There were no African American- or Hispanic American-owned construction businesses in the sample.

Average receipts were higher for businesses with paid employees (the third and fourth columns of results in Figure H-10). Non-Hispanic white-owned construction employer businesses had average receipts of $905,000. Minority-owned construction firms with paid employees had receipts as follows:

- Average receipts of Asian American-owned construction employer businesses ($2.6 million) were more than double that of non-Hispanic white-owned construction employer businesses in Montana;
- American Indian- and Alaska Native-owned construction employer businesses ($964,000) exhibited revenues that were higher than the average of non-Hispanic white-owned employer businesses; and
- Average receipts for women-owned construction employer businesses ($1 million) were greater than the average for male-owned employer businesses ($976,000).

Professional, scientific and technical services. In the Montana professional, scientific and technical services industry, minority-owned businesses had lower average receipts than non-Hispanic white-owned businesses. Results for all businesses (i.e., employer and non-employer businesses combined) in the professional, scientific, and technical services industry indicate that:

- Average receipts of Asian American-owned businesses ($140,000) were 83 percent of non-Hispanic white-owned businesses ($169,000);
- Average receipts of Hispanic American-owned companies ($94,000) were 35 percent of non-Hispanic white-owned businesses;
- Average receipts of American Indian- and Alaska Native-owned businesses ($41,000) were one-fourth the average receipts of non-Hispanic white-owned businesses; and
- Average receipts of women-owned businesses in the Montana professional, scientific and technical services industry ($65,000) were 29 percent of male-owned businesses ($225,000).

There were no African American-owned businesses in the sample for Montana.

Limiting the analysis to firms with paid employees, results for the Montana professional, scientific and technical services industry were as follows:

- Average receipts of Asian American-owned businesses ($1.59 million) were substantially higher than non-Hispanic white-owned businesses ($577,000);
- Average receipts of Hispanic American-owned companies ($197,000) were 34 percent of non-Hispanic white-owned businesses;
- Average receipts of American Indian- and Alaska Native-owned businesses ($415,000) were 72 percent of the average receipts of non-Hispanic white-owned businesses; and
- Average receipts of women-owned businesses in the Montana professional, scientific, and technical services industry ($296,000) were 41 percent of male-owned businesses ($724,000).

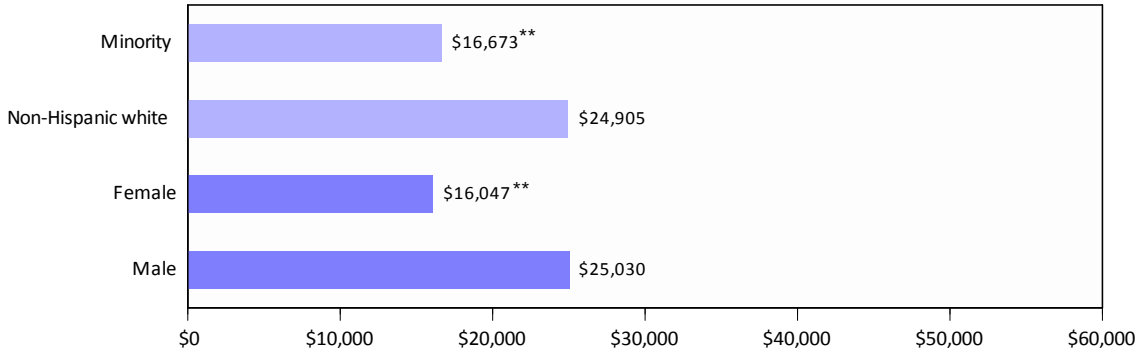
Construction business earnings. Keen Independent also examined U.S. Census data regarding earnings of business owners in Montana. Data sources were the Public Use Microdata Series (PUMS) data from the 2000 U.S. Census of Population and the 2008-2012 American Community Survey (ACS). Keen Independent analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. Results are presented for the Montana construction industry. Similar analysis for the engineering industry was not possible due to small sample size (just four minority- or woman-owned businesses in the 2000 Census sample, and six in the 2008-12 ACS).

Construction business owner earnings, 1999. The 2000 Census of Population asked business owners about their business earnings in the previous year (1999). Figure H-11 shows average earnings in that year for business owners in the construction industry in Montana. Due to small sample sizes for individual racial/ethnic groups, Keen Independent reports results for minorities as a single group.

The top two bars of Figure H-11 present results for minority and non-Hispanic white owners of construction businesses in Montana for 1999. Results indicated that on average, earnings of minority construction business owners in Montana ($16,673) were less than non-Hispanic white construction business owners ($24,905). This difference was statistically significant at the 95 percent confidence level.

The bottom two bars of Figure H-11 compare business owner earnings for women and men who owned construction businesses in Montana. With mean earnings of $16,047, female construction business owners in Montana earned less than male construction business owners ($25,030). This difference was statistically significant at the 95 percent confidence level.

Figure H-11.
Mean annual business owner earnings in the construction industry in Montana, 1999



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars. ** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level.

Source: Keen Independent Research from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

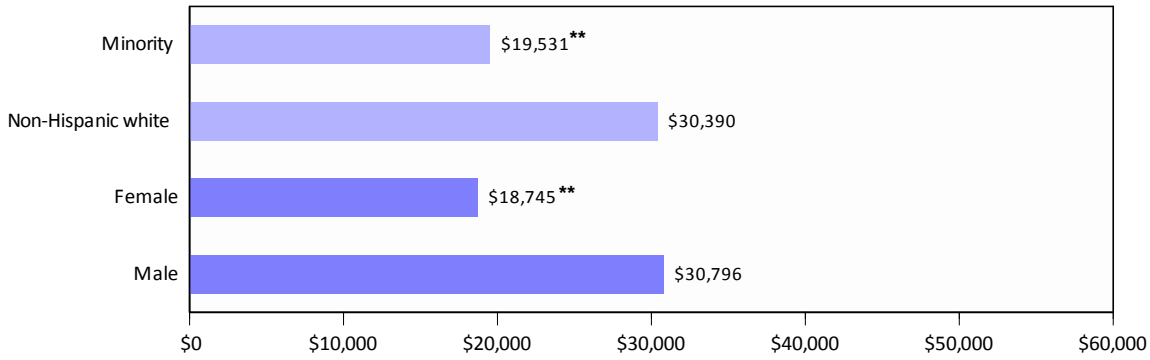
Construction business owner earnings, 2007-2012. The 2008-2012 ACS also reports business owner earnings. Because of the way that the U.S. Census Bureau conducts each year's ACS, earnings for business owners reported in the 2008 through 2012 sample were for the previous 12 months (2007-2012).[20] All dollar amounts are presented in 2012 dollars.

Figure H-12 shows earnings in 2007 through 2012 for business owners in the construction industry in Montana. Again, due to small sample sizes for minority groups, results for these groups were combined.

- On average, minority construction business owners in Montana earned less in 2007-2012 ($19,531) than non-Hispanic white construction business owners ($30,390), a statistically significant difference at the 95 percent confidence level.
- Female construction business owners in Montana also earned substantially less, on average ($18,745), than male construction business owners ($30,796), a statistically significant difference at the 95 percent confidence level.

[20] For example, if a business owner completed the survey on January 1, 2009, the figures for the previous 12 months would reference January 1, 2008 to December 31, 2008. Similarly, a business owner completing the survey December 31, 2011 would reference amounts since January 1, 2011.

Figure H-12.
Mean annual business owner earnings in the construction industry in Montana, 2007 through 2012



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars. ** Denote statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level.

Source: Keen Independent Research from 2008-2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Regression analyses of business earnings. Differences in construction business earnings among different racial, ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status, and educational attainment. Keen Independent performed regression analyses using 2008-2012 ACS data to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral factors.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.[21] The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race, ethnicity and gender of business owners, the model also included variables for characteristics considered likely to affect earnings, including age, age-squared, marital status, ability to speak English well, disability condition, and educational attainment.

Keen Independent's regression model for Montana for construction business owner earnings in 2007 through 2012 included 495 observations. Figure H-13 presents the results.

[21] 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.

The regression model indicated that several race- and gender-neutral factors predicted earnings of business owners in the Montana construction industry (and were statistically significant):

- Being older was associated with higher business earnings (with additional age having less of an effect for older individuals);
- Not being able to speak English well was associated with lower business earnings;
- Having a disability was associated with lower business earnings; and
- Having an education of less than a high school diploma was associated with higher business earnings (the reason, however, is unclear).

After accounting for race- and gender neutral factors, results for race/ethnicity and gender were as follows:

- The model suggested that there were negative effects on business earnings for minority construction business owners, and that the difference was statistically significant at the 90 percent level; and
- Being female was associated with lower business earnings and that effect was also statistically significant at the 90 percent level.

Figure H-13.
Montana construction business owner earnings model, 2007-2012

Variable	Coefficient
Constant	8.011 **
Age	0.153 **
Age-squared	-0.002 **
Married	0.020
Speaks English well	-1.420 **
Disabled	-1.097 **
Less than high school	0.367 *
Some college	0.194
Four-year degree	-0.519
Advanced degree	0.417
Minority	-0.548 *
Female	-0.403 *

Note:

*,** Denote statistical significance at the 90% and 95% confidence level, respectively.

Source:

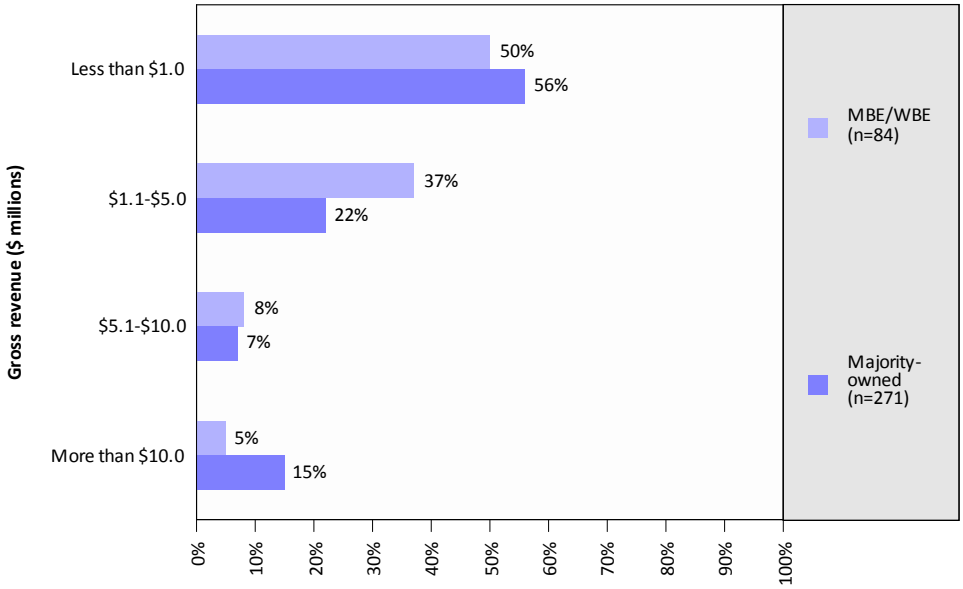
Keen Independent Research from 2008-2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Gross revenue of construction and engineering firms from availability interviews. In the availability telephone interviews that Keen Independent conducted in 2015, firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous three years.

Figure H-14 presents the reported annual revenue for MBE/WBEs and majority-owned businesses.

- A smaller percentage of MBE/WBEs (50%) than majority-owned businesses (56%) reported average revenue of less than $1 million per year.
- A much larger proportion of MBE/WBEs (37%) than majority-owned firms (22%) reported annual revenue between $1 million and $5 million.
- The percentage of MBE/WBEs and majority-owned firms indicating average annual revenue of $5 million to $10 million was similar (8% and 7%).
- After combining the two highest revenue categories in Figure H-14, a relatively small proportion of MBE/WBEs reported average revenue more than $10 million per year (5% of MBE/WBEs) compared with majority-owned businesses (15%).

Figure H-14.
Gross revenue of company for all locations, MBE/WBEs and majority-owned firms, 2012-2014



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 2015 Availability Interviews.

Summary of analysis of business receipts and earnings. Keen Independent examined business earnings data for Montana construction and engineering-related industries from the U.S. Census Bureau and the 2014 availability interviews with Montana businesses. The data from different data sets pertained to annual revenue in 1999, 2007-2012 and the three years before 2015.

Examining annual receipts data for 2007 for all construction firms in Montana, average revenue of Asian American-owned firms somewhat exceeded non-Hispanic white-owned businesses. Average revenue of American Indian-owned construction firms was substantially less than non-Hispanic white-owned companies. There was little difference in average revenue of female- and male-owned construction companies based on these data.

Annual receipts data for 2007 for professional, scientific and technical services firms in Montana indicated that Asian American-, Hispanic American- and American Indian-owned firms had lower revenue than non-Hispanic white-owned firms (considering all firms). Female-owned businesses had lower revenue than male-owned companies.

Data from the 2000 U.S. Census and 2008 through 2012 American Community Survey showed substantially lower construction business owner revenue for minorities than non-minorities. Women who owned construction businesses also earned substantially less than male business owners. Regression analyses using the 2008 through 2012 data indicated that minority and female owners of construction businesses had lower earnings than non-Hispanic whites and men after controlling for other factors.

Based on 2015 availability interview results, MBE/WBEs were far less likely than majority-owned businesses to have annual revenue above $10 million. Based on this result, relatively more MBE/WBEs are "small businesses." However, relatively fewer MBE/WBEs reported annual revenue of less than $1 million compared with majority-owned firms.

Availability Interview Results Concerning Potential Barriers

As part of the availability interviews conducted with Montana businesses, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the interview process and provides the interview questions. Appendix G presents results for questions concerning access to capital, timely payment, bonding and insurance.

Results for other interview questions are examined here, including whether the firm had experienced difficulties learning about:

- Bid opportunities with MDT;
- Bid opportunities with local governments;
- Bid opportunities in the private sector;
- Subcontracting opportunities; and
- Networking with prime contractors or customers.

Note that the number of responses for minority-owned firms was small (22-24 respondents to each question).

Learning about MDT bid opportunities. As shown in Figure H-15 on the following page, about one-in-five availability interview respondents majority-owned firms indicated difficulties learning about MDT bid opportunities. White women-owned firms were somewhat more likely than majority-owned firms to report such difficulties (27% reported this difficulty).

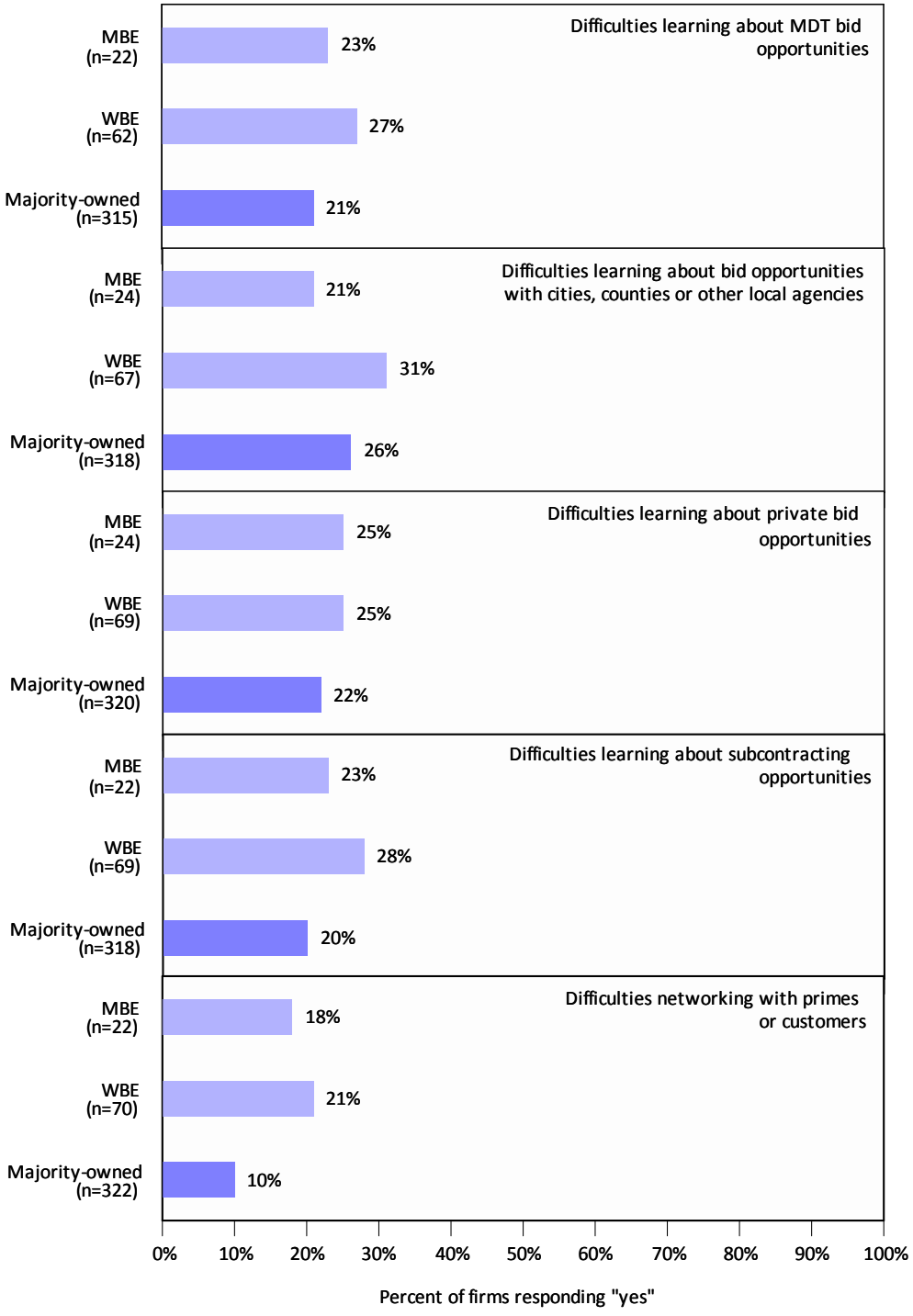
Learning about local agency bid opportunities. Somewhat more survey respondents indicated difficulties learning about local government bid opportunities in Montana. Again, the share of WBE businesses indicating this difficulty was somewhat higher than for majority-owned firms. (31% versus 26%).

Learning about private sector bid opportunities. About one-quarter of businesses reported difficulties in learning about private sector bid opportunities in Montana. There were no substantial differences in the relative number of MBEs, WBEs and majority-owned firms reporting this difficulty.

Learning about subcontracting opportunities. WBEs were more likely than majority-owned firms to report difficulties learning about subcontracting opportunities.

Networking with prime contractors or customers. Minority- and women-owned firms were substantially more likely to report difficulties networking with prime contractors or customers compared with majority-owned firms. About 18 percent of MBEs and 21 percent of WBEs indicated such difficulties compared with 10 percent of majority-owned firms. The bottom portion of Figure H-15 provides these results.

Figure H-15.
Responses to 2015 availability interview questions concerning learning about work and networking, MBE/WBEs and majority-owned firms in the Montana transportation contracting industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

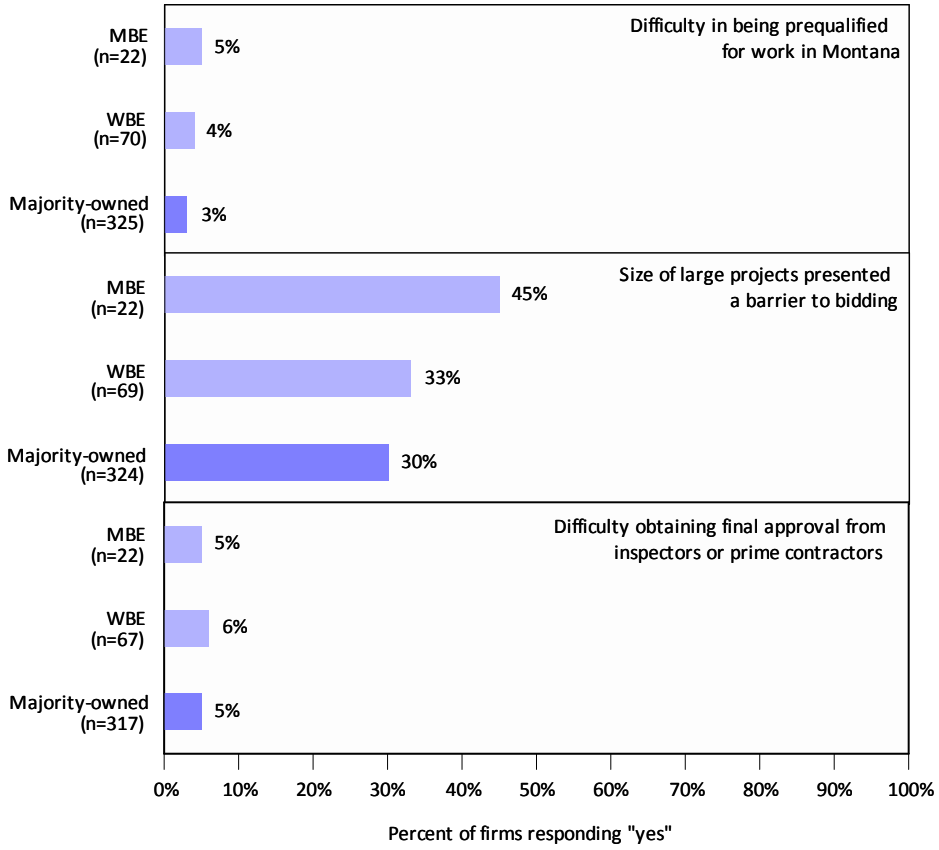
Source: Keen Independent Research from 2015 availability interviews.

Being prequalified for work. As shown at the top of Figure H-16, very few MBEs, WBEs or majority-owned firms reported difficulties being prequalified for work in Montana.

Size of projects. Almost one-half of MBEs and one-third of WBEs indicated that the size of large projects presented a barrier to bidding. Only 30 percent of majority-owned firms reported size of large projects as a barrier.

Obtaining final approval on work from inspectors or prime contractors. Few firms indicated difficulties regarding inspections or approval of work (see bottom of Figure H-16). Responses of MBEs, WBEs and majority-owned firms were similar.

Figure H-16.
Responses to 2015 availability interview questions concerning prequalification, size of projects and approval of work, Montana MBE/WBE and majority-owned firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2015 Availability Interviews.

Summary of analysis of availability interview questions concerning barriers. Responses to questions concerning potential barriers indicated that relatively more WBEs than majority-owned firms experience difficulties:

- Learning about MDT and other public agency bid opportunities;
- Learning about subcontract opportunities; and
- Networking with prime contractors and customers.

These three types of barriers appear to indicate unequal access to information about opportunities for white women-owned firms in Montana.

Minority-owned firms were also more likely than majority-owned firms to report these barriers, although the number of MBE respondents was small and the differences were not as large as for WBEs.

Both MBEs and WBEs were more likely than majority-owned firms to indicate that large project sizes presented a barrier.

MBE, WBE and majority-owned firms' responses to other questions about potential barriers were very similar, especially for prequalification and receiving approvals from inspectors. Very few firms reported prequalification or receiving approvals as barriers.

Summary

Keen Independent drew on information from availability interviews to examine any patterns of MBE/WBE and majority-owned business participation in the industry. Results suggest the following:

- Many firms in the transportation contracting industry pursue both public and private sector work depending on the type of work they do and market opportunities. This is true for MBEs and WBEs as well as majority-owned firms.
- About two-thirds of MBEs, WBEs and majority-owned firms bid or propose as prime contractors or prime consultants. Many firms also bid as subcontractors as well.
- Firms in different lines of work within the transportation industry tend to bid on different sizes of contracts (i.e., paving contracts are larger than surveying contracts). Less than one-third of firms in the industry reported that they had bid on or received a road-, highway- or bridge-related contract in Montana of more than $1 million in the past five years. However, MBE/WBEs were somewhat more likely to report bidding on large contracts than majority-owned firms. Even after controlling for firm specialization, there is no indication that "bid capacity" is, on average, less for MBE/WBEs than majority-owned firms. Age of firm and its primary line of work, not whether it was minority- or women-owned, were the primary determinants of "bid capacity" in this analysis.

Keen Independent examined U.S. Small Business Administration analyses for 2002 to 2006 for Montana regarding rates of business closure, expansion or contraction by race, ethnicity and gender of the business owner. Compared with white-owned firms, these data indicate greater rates of business closure and contraction for African American- and Asian American-owned firms in Montana from 2002 to 2006, but not for Hispanic American-owned firms. There was evidence that women-owned firms fared better than male-owned firms when examining the relative number of firms in Montana that closed, contracted and expanded.

The study team analyzed business earnings data for Montana construction and engineering-related industries from the U.S. Census Bureau and the 2015 availability interviews with Montana businesses. The data for annual revenue pertained to 1999, 2007 through 2012 and the three years before 2015.

- The U.S. Survey of Business Owners for 2007 indicated lower revenue for Native American-owned construction firms compared with non-Hispanic white-owned firms but not for Asian American-owned construction firms. Average revenue of female- and male-owned construction firms in 2007 was about the same. (There were no data reported for African American- or Hispanic American-owned construction businesses.) This data source indicated lower annual revenue for minority- and women-owned professional, scientific and technical services firms in Montana in 2007.

- U.S. Census data for 2000 and American Community Survey (ACS) data for 2008 through 2012 showed substantially lower business owner earnings for minority and female construction business owners in Montana compared with non-minority or male business owners.

- The study team developed regression models using the ACS data for 2008 through 2012 to examine whether disparities for minority and female construction business owners persisted after accounting for personal characteristics of the business owner. Regression analyses using these data indicated that minority and female construction business owners had lower earnings than non-minority and male owners after controlling for other factors.

- Based on 2015 availability interview results, MBE/WBEs were far less likely than majority-owned transportation contracting firms to have average annual revenue above $10 million for 2012 through 2014 (15% of majority-owned firms reported such revenue compared with 5% of MBE/WBEs). Based on this result, relatively more MBE/WBEs in the Montana transportation contracting industry are "small businesses." Even though one-half of MBE/WBEs in the Montana transportation contracting industry reported annual revenue of less than $1 million, relatively more majority-owned firms (56%) reported annual revenue in this range.

Keen Independent's availability interviews with businesses in the Montana transportation contracting industry included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business or obtaining work. Relatively more WBEs than majority-owned firms experience difficulties learning about different types of work and networking with prime contractors and customers. These three types of barriers appear to indicate unequal access to information about opportunities for white women-owned firms in Montana. Minority-owned firms were also more likely than majority-owned firms to report these barriers, although the number of MBE respondents was small and the differences were not as large as for WBEs. MBEs and WBEs were also more likely than majority-owned firms to indicate that large project size presented a barrier.

APPENDIX I.
Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, Keen Independent used data from the following secondary data sources:

- Integrated Public Use Microdata Series (IPUMS) from the 2000 Decennial Census;
- Integrated Public Use Microdata Series (IPUMS) data from the 2008-2012 (five-year) American Community Survey (ACS);
- Federal Reserve Board's 2003 Survey of Small Business Finances (SSBF);
- 2012 Survey of Business Owners (SBO) conducted by the U.S. Census Bureau; and
- 2007 and 2013 Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its quantitative marketplace analyses.

IPUMS Data

The Minnesota Population Center is home to the Integrated Public Use Microdata Series (IPUMS), the largest repository of national and international Census microdata for social and economic research. Researchers may access the IPUMS program and retrieve customized, accurate datasets.[1] The IPUMS-USA data consist of more than 50 samples of the American population. These samples are drawn from both censuses (1850 to 2000) and ACS (2000-2012).

IPUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and state-level samples, and large sample sizes that enable analysis with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups). Because the design of these surveys has changed over time, they have a wide range of record layouts and coding schemes. The IPUMS data files are specifically formulated to standardize the U.S. Census Bureau Public Use Microdata Sample (PUMS) data from year to year. Variables that cannot be compared across years are removed from the dataset. In multiyear files, IPUMS inflates dollar values to the most recent year in the sample. IPUMS also provides some additional geographic and family interrelationship variables. Most importantly, IPUMS provides strata and cluster variables for survey samples prior to 2005, as well as replicate weights for survey samples since 2005 to account for the complexity of the sample design in the measurement of standard errors.

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[1] Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder, and Matthew Sobek. *Integrated Public Use Microdata Series: Version 5.0* [Machine-readable database]. Minneapolis: University of Minnesota, 2011.

The study team obtained selected Decennial Census and ACS IPUMS data from the University of Minnesota Population Center. Focusing on the construction and engineering industries, Keen Independent used IPUMS data to analyze workers and households in Montana by examining:

- Demographic characteristics;
- Measures of financial resources;
- Educational attainment; and
- Self-employment (business ownership).

For the analyses contained in this report, the study team used the 2000 Census 5 percent samples and 2008-2012 ACS samples.

2000 Census data. The 2000 U.S. Census Montana sub-sample contains 45,864 individual observations, weighted to represent 902,740 people.

Categorizing individual race/ethnicity. To define race/ethnicity for the 2000 Census dataset, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered "non-Hispanic white" if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual's race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank-ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified with multiple races was placed in the reported race category with the highest ranking in the study team's ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as "Korean," that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as "Korean" in combination with "black," the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Bhutanese, Burmese, Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Nepalese, Okinawan, Samoan, Tahitian, Taiwanese, Thai, Tongan, and Vietnamese. This category also included other Polynesian, Melanesian, and Micronesian races, as well as individuals who identified as Pacific Islanders.

- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani, and Sri Lankan. Individuals who identified themselves as "Asian," but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.

- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.

- If an individual identified with any of the above groups and an "other race" group, the individual was categorized into the known category. Individuals who identified as "other race" or "white and other race" were categorized as "other minority."

For some analyses — those in which sample sizes were small — the study team combined minority groups.

Business ownership. Keen Independent used the Census "labor force status" variable (LABFORCE) and the detailed "class of worker" variable (CLASSWKD) to determine self-employment.[2] Individuals were classified into the following categories.

- Self-employed for a non-incorporated business;
- Self-employed for an incorporated business;
- Wage or salary employee for a private firm;
- Wage or salary employee for a non-profit organization;
- Employee of the Federal government;
- Employee of a State government;
- Employee of a local government; or
- Unpaid family worker.

The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.[3]

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

[3] For the analysis of business ownership, the study team excluded active duty members of the U.S. Armed Forces and all other wage/salary workers.

Study industries. The marketplace analyses focus on two study industries: construction and engineering-related services. Keen Independent used the IND variable to identify individuals as working in one industry or the other. The variable reports the industry in which a person performed an occupation, and includes several hundred industry and subindustry categories. Figure I-1 identifies the IND codes used to define each study area for the 2000 Census and 2008-2012 ACS analyses.

Figure I-1.
2000 Census and 2008-2012 ACS industry codes used for construction and engineering-related services

Study industry	2000 Census/ 2008-2012 ACS IND codes	Description
Construction	77/770	Construction industry
Engineering-related services	729/7290	Architectural, engineering and related services

Source: Keen Independent Research from the IPUMS program: https://usa.ipums.org/usa/.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-2 summarizes the 2000 Census and 2008-2012 ACS OCC codes used in the study team's analyses.

Figure I-2.
2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction

Census 2000/ 2008-2012 ACS occupational title and code	Job description
Construction managers 22/220	Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers, and constructors who manage, coordinate, and supervise the construction process.
First-line supervisors/managers of construction trades and extraction workers 620/6200	Directly supervise and coordinate the activities of construction or extraction workers.

Figure I-2 (continued).
2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction

Census 2000 and 2008-2012 ACS occupational title and code	Job description
Construction laborers 626/6260	Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades."
Miscellaneous construction equipment operators, including pile-driver operators 632/6320	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures, such as buildings, bridges, and piers.
Electricians 635/6350,6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems. Exclude "Security and Fire Alarm Systems Installers." The 2000 category includes electrician apprentices.
Driver/sales workers and truck drivers 913/9130	*Driver/sales workers* 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. *Truck drivers (heavy)* 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. *Truck drivers (light)* 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."

Source: 2000 Census occupational titles and codes, retrieved from http://usa.ipums.org/usa/volii/00occup.shtml. 2008-2012. ACS occupational titles and codes, retrieved from https://usa.ipums.org/usa/volii/c2ssoccup.shtml.

Education variables. Keen Independent used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into six categories:

- Less than high school;
- High school diploma or equivalent;
- Some college but no degree;
- Associate's degree;
- Bachelor's degree; and
- Advanced degree.

Definition of workers. The universe for the class of worker, industry, and occupation variables includes workers 16 years of age or older who are "gainfully employed" and those who are unemployed but seeking work. "Gainfully employed" means that the worker reported an occupation as defined by the Census code OCC.

2008-2012 American Community Survey (ACS) data. The study team also examined 2008-2012 ACS data from IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form.[4] Since 2005, the ACS has expanded to roughly a 1 percent sample of the population, based on a random sample of housing units in every county in the United States (including District of Columbia and Puerto Rico). The 2008-2012 ACS estimates represent the average characteristics over the five-year period.

There were 47,992 observations included in the Montana sub-sample data; the 2008-2012 ACS dataset represents about 1 million people in the Montana marketplace.

Changes in race/ethnicity categories between 2000 Census and 2008-2012 ACS data. The 2000 Census 5 percent sample and the 2008-2012 ACS IPUMS data use essentially the same categories for the detailed race variable (RACED). However, in some cases, the numerical code assignment is different; the study team accounted for those differences. Categories for the Hispanic variable (HISPAN) remained consistent between the two datasets.

[4] U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing 2009. Retrieved from http://www.census.gov/acs/www/SBasics/desgn_meth.htm.

Survey of Small Business Finances (SSBF)

The study team used the SSBF to analyze the availability and characteristics of small business loans. The Federal Reserve Board conducted the SSBF every five years, but stopped after 2003.

The SSBF collects financial data from non-governmental for-profit firms with fewer than 500 employees. The survey uses a nationally representative sample, structured to allow for analysis of specific geographic regions, industry sectors, and racial and gender groups. The SSBF is unique as it provides detailed data on both firm and owner financial characteristics. For the purposes of this report, Keen Independent used the survey from 2003, which is available at the Federal Reserve Board website.[5]

Categorizing owner race/ethnicity and gender. In the 2003 SSBF, businesses were able to give responses on owner characteristics for up to three different owners. The data also included a fourth variable, a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables, the study team used the final weighted average for variables on owner characteristics. Definition of race and ethnic groups in the 2003 SSBF are slightly different than the classifications used in the 2000 Census and 2008-2012 ACS.

The SSBF classified race and ethnicity of businesses according to the following five groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian American;
- Native American; and
- Other (unspecified).

A business was considered Hispanic American-owned if more than 50 percent of the business was owned by Hispanic Americans, regardless of race. All businesses that reported 50 percent or less Hispanic American ownership were included in the racial group that owned more than half of the company. No firms reported the race/ethnicity of their owners as "other."

Similar to race, firms were classified as female-owned if more than 50 percent of the firm was owned by women. Firms owned half by women and half by men were classified as male-owned.

[5] The Federal Reserve Board. *Survey of Small Business Finances, 2003*. Retrieved from http://www.federalreserve.gov/pubs.

Defining selected industry sectors. In the 2003 SSBF, each business was classified according to Standard Industrial Classification (SIC) code and placed into one of seven industry categories:

- Construction;
- Mining;
- Transportation, communications, and utilities;
- Finance, insurance, and real estate;
- Trade;
- Engineering; or
- Services (excluding engineering).

Region variables. The SSBF divides the United States into nine Census Divisions. Along with, Arizona, Colorado, Idaho, New Mexico, Nevada, Utah and Wyoming, Montana resides in the Mountain Census Division (referred to in marketplace appendices as the Mountain region).

Loan denial variables. In the 2003 survey, firm owners were asked if they have applied for a loan in the last three years and whether loan applications were always approved, always denied, or sometimes approved and sometimes denied. For the purposes of this study, only firms that were always denied were considered when analyzing loan denial.

Data reporting. Due to missing responses to survey questions in SSBF datasets, data were imputed to fill in missing values. The missing values in the 2003 dataset were imputed using a different method than in previous SSBF studies. In the 1998 survey data, the number of observations in the dataset matches the number of firms surveyed. However, the 2003 data includes five implicates, each with imputed values that have been filled in using a randomized regression model.[6] Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. For the Mountain Region alone, there were 3,690 observations representing 738 businesses. Across the five implicates, all non-missing values are identical, whereas imputed values may differ.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates as well as inaccurate variances and confidence intervals.[7] Those problems can be corrected through the use of multiple implicates. For summary statistics using 2003 SSBF data, Keen Independent utilized all five implicates and included observations with missing values in the analyses. For the probit regression models presented in Appendix G, the study team used the first implicate and did not include observations with imputed values for the dependent variables.

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[6] For a more detailed explanation of imputation methods, see the "Technical Codebook" for the *2003 Survey of Small Business Finances.*

[7] Lieu N. Hazelwood, Traci L. Mach and John D. Wolken. *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses.* Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board. Washington, D.C., 2007. Retrieved from http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf.

Survey of Business Owners (SBO)

Keen Independent 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 were collected in 2012, but were first released in August of 2015; the full data will be released December 2015. For this report, all variables necessary to complete the analysis were available in the preliminary release.

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, 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 and race/ethnicity.

The SBO uses the 2012 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction and engineering-related services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Americans, Hispanic Americans, Native Americans, or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership.

The study team reported business receipts for the following race/ethnicity and gender groups:

- African Americans;
- Asian Americans;
- Hispanic Americans;
- Native Americans;
- Non-Hispanic whites;
- Men; and
- Women.

Home Mortgage Disclosure Act (HMDA) Data

Keen Independent analyzed mortgage lending in Montana and nationwide using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Financial institutions were required to report HMDA data for 2013 if they had assets of more than $42 million ($35 million for 2007), had a branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, were located in a metropolitan statistical area (MSA) (or originated five or more home purchase loans in an MSA), and either had more than $10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

The study team used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2007 and 2013. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

APPENDIX J.
Qualitative Information from In-depth Interviews, Availability Interviews and Public Comments

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. Keen Independent gathered and analyzed input from 43 business and trade association representatives for this Appendix. The study team also analyzed qualitative results from 103 availability interview respondents who gave qualitative input. We present Appendix J in 13 parts:

A. Introduction describes the process for gathering and analyzing the information summarized in Appendix J. (page 2)

B. Background on the Transportation Contracting Industry in Montana summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners' experiences pursing public and private sector work. (page 3)

C. Economic Conditions affecting the Transportation Contracting Industry in Montana presents information on current economic conditions and any effects from the Great Recession and its recovery. (page 16)

D. Public and Private Sector Transportation Contracting in Montana summarizes information about the mix of businesses' public and private sector work and how they obtain that work. (page 22)

E Doing Business as a Prime Contractor or as a Subcontractor presents information about the mix of businesses' prime contract and subcontract work and how they obtain that work. (page 31)

F. Keys to Business Success and Any Barriers in the Way summarizes information about certain barriers to doing business and keys to success, including access to financing, bonding, and insurance. (page 40)

G. Experience Doing Business with Public Agencies presents information about any experiences with unfair treatment such as bid shopping and bid manipulation, and unfair treatment during performance of work and approval of work. (page 54)

H. Allegations of Unfavorable Treatment summarizes information about stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affects opportunities for DBEs. (page 78)

I. Information on Unfavorable Treatment that may have been Racial-/Ethnic- or Gender-based presents information about business assistance programs, efforts to open contracting processes and other steps to remove barriers for all businesses or small businesses and minority- and woman-owned businesses. (page 82)

J. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures presents information about business technical assistance programs and supportive services available to business owners in Montana. (page 91)

K. Insights Regarding the DBE Program summarizes information about advantages and disadvantages of the DBE Program, its monitoring and any false reporting or "fronts." (Page 114)

L. Insights Regarding DBE Certification provides information about advantages and disadvantages that subcontractors experience because of their certification as a DBE. (Page 122)

M. Overall Comments and Recommendations for MDT. (Page 128)

A. Introduction

The Keen Independent study team conducted in-depth personal interviews and availability interviews from September 2015 through mid-January 2016. Although the public could also provide comments via the study team website and a designated phone line and email address, the study team received zero public comments through this process.

In the in-depth personal interviews, availability interviews and public comment process, business owners and managers had the opportunity to discuss their experiences working in the local transportation contracting industry; experiences working with MDT and other public agencies; perceptions of the Federal DBE Program and other topics important to them.

In-depth personal interviews. The study team conducted in-depth personal interviews with 41 Montana businesses and two trade associations, totaling 43 in-depth interviews. These included discussions about interviewees' perceptions and anecdotes regarding the local transportation contracting industry, the Federal DBE Program, and the contracting and procurement policies, practices, and procedures of MDT. Local Montana firms Fagan Law Office, a DBE-certified Missoula-based law firm, and Olson Communications, a DBE-certified Billings-based communications consulting firm, conducted 39 in-depth interviews for this disparity study; Keen Independent conducted four in-depth interviews.

Interviewees included individuals representing construction businesses, engineering firms, professional services firms and trade associations. The study team identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of business owner. The study team conducted most of the interviews with the owner, president, chief executive officer, or other officer of the business or association. Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both.

All of the businesses conducted work in Montana and identify in Appendix J by random interviewee numbers (i.e., #1, #2, #3, etc.). Trade organizations reference as "TO" (i.e., #TO1 and #TO2).

Interviewees were often quite specific in their comments. As a result, in many cases the study team reported them in a form that is more general. This minimizes the chance that readers could identify interviewees or other individuals or businesses mentioned in the interviews. The study team indicates whether each interviewee represents a DBE-certified business and reports the race/ethnicity and gender of the business owner.[1]

Availability interviews. The study team also asked firm owners and managers to provide comments at the end of the online or telephone interview. The study team asked, "We would like to get any other comments or suggestions you may have regarding barriers or difficulties your firm has experienced in starting or expanding your business, or with obtaining work. Are there any other barriers or difficulties that we have not discussed that come to mind?"

The study team analyzed 103 responses to the question and provided examples of different types of comments in Appendix J. Availability interview respondent comments reference as "AI" (i.e., #AI1, #AI2, etc.).

Ongoing public input. The study team also provides ongoing opportunity for public comments via the study team website (http://www.mdt.mt.gov/disparitystudy/) and a designated phone number (406-333-1690) and email address (mdtdisparityinfo@keenindependent.com). The study team will solicit public comments and hold public meetings in spring 2016. The study team plans to add those results to Appendix J.

B. Background on the Transportation Contracting Industry in Montana

Business owners reported on their business histories. Part B summarizes information related to:

- Business start-up history;
- Work types and sizes of contracts;
- Business location and work territory;
- Business expansion or contraction;
- Employment size and staff development; and
- Challenges to starting, sustaining or growing a business, including those that may be race-, ethnic- or gender-based.

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[1] Note that "male" or "white" are sometimes not included as identifiers to simplify the written descriptions of business owners.

Business start-up history. Many interviewees representing construction and engineering businesses working in Montana reported that their companies were started (or purchased) by individuals with connections in their respective industries. Of those without a background in the industry, many reported starting their firm due to a singular unexpected opportunity. This pattern demonstrates that any systematic race or gender barriers to entering and advancing within the Montana construction and engineering industries would affect the relative number of firms started by minorities and women in Montana.

Many firm owners worked in the industry before starting their businesses. [e.g., #1, #2, #6, #18, #20, #22, #25, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39, #40] For example:

- A white male owner of a majority-owned construction firm reported that he began the business with other partners who were already working in the industry. [#13]

- The white male owner of a consulting firm reported that after he received his degree, he worked with a firm in his chosen field for about eight years before going out on his own and starting the company. [#14]

- The white female owner of a consulting firm reported that she had business experience with another consulting business for many years. She added that some clients wanted her to continue working when she went to graduate school; she started her own firm to meet that need. [#21]

- The white female owner of a DBE-certified consulting firm reported that she came to Montana and began work for a national firm. She moved on to other companies since then. She added that eventually she was performing the majority of the responsibilities as a business owner on her own and decided to take the next step in starting her own business. [#24]

- The white female owner of a DBE-certified design firm reported that she was a practicing design professional for four years before starting her own firm. [#26]

- A female representative of a majority-owned heavy construction business reported that the president/founder of the firm holds degrees relevant to their industry. [#15]

- A white male representative of a majority-owned engineering firm reported that the firm launched before he was born. He added that the firm began as a branch office of a business in another state; two practicing engineers decided to purchase the firm and go out on their own. [#11]

- A white male owner of a majority-owned specialty contracting firm reported that he had a background in both the transportation and construction industries before starting his firm. He went on to indicate that his partners had past industry experience as well. [#41]

- A white male representative of a trade organization reported that the organization's primary director had previous experience in the industry. He went on to note that he himself was previously involved in the industry as well. [#TO2]

Some business owners reported that they started their firm because a particular opportunity presented itself. For example:

- The white female owner of a DBE-certified specialty contracting business decided to start her business because there was no competition on her side of the state in that field. [#3]

- The Native American female owner of a DBE-certified supplier responded that when she acquired a ranch, opportunity "opened her eyes" to the fact that there was value in the ranch's resources that others wanted to use, thus she created her business. [#19]

- A white male representative of a DBE-certified, woman-owned construction firm reported that his firm started for a particular construction project; the owner subsequently capitalized on the success of that project to continue in the industry. [#10]

Work types and sizes of contracts. Many businesses have flexibility in types and sizes of work performed. Firms generally reported flexibility in adapting to market forces.

Types of work. While work type often varies for many businesses, some have seen little change in the types of work they perform. [e.g., #13, #20, #22, #23, #24, #33, #34, #35, #36, #38, #41]

Others have altered focus or added services over time. [e.g., #25, #26, #27, #29, #30, #31, #40] Many commented on the changes in services performed over time:

- The white female owner of a DBE-certified specialty contracting business reported that the firm started as a supplier before moving on to contracting, and has now become a distributor. She added that they are developing a larger customer base though they are doing smaller jobs, and explained that one type of job leads to another. Over time, their work has expanded to other areas. [#1]

- The white female owner of a DBE-certified specialty contracting business reported that the firm is moving towards other types of work for more subcontracting opportunities. [#3]

- The white female owner of a DBE-certified specialty contracting firm stated that in 2010 to 2011 the firm had to pursue work in municipalities because there were fewer opportunities in commercial or residential projects. She went on to say that the public sector work the firm sought expanded to some heavy construction work. [#4]

- A white male representative of a majority-owned specialty contracting business reported that the firm has expanded its operations over time to include a number of additional services. [#5]

- The Native American male owner of a DBE-certified specialty contracting company said that his firm added additional, year-round services so that they were less dependent on seasonal work. [#7]

- A white male representative of a majority-owned engineering firm reported that the firm has always specialized in engineering consulting; however, the types of companies they work for and some engineering services have changed over time. [#11]

- The white male owner of a consulting firm reported that they have broadened the scope of services they offer. He added that they also have a broader client base than in the past. [#14]

- The white female owner of a consulting firm reported that her firm has changed the type of work it performed over time, both by adding additional services and transitioning its focus to meet changing demands. [#21]

- The white female owner of a DBE-certified specialty consulting firm stated that she has had her own business for many years, and that she initially specialized in only one type of consulting. She went on to say that over time, her business shifted to other practice areas. [#37]

Size of contracts. Nearly all firms reported pursuing a wide range of project sizes. [e.g., #17, #18, #29, #32, #33, #36, #41, #TO1] For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that their contract sizes vary from $1,200 up to $700,000. [#2]

- The white female owner of a DBE-certified specialty contracting business reported that the firm takes whatever size contracts (small, medium, large) it bids and wins. [#3]

- According to the white female owner of a DBE-certified specialty contracting firm, her firm performs jobs from $300 to $2 million. [#4]

- A Native American male representative of a majority-owned specialty contractor commented that the firm performs contracts from $1,000 to $50 million. [#5]

- A white male owner of a SDVOSB-certified engineering firm reported that the firm has completed $650,000 construction and $100,000 engineering projects, as well as much smaller projects. [#9]

- The white male owner of a consulting firm reported that many of their contracts vary in size, with some ranging from $20,000 to $100,000. He added that sometimes if a contract is particularly large, they team up with another firm to avoid taking on more than they can handle. [#14]

- When asked about the sizes of contracts they complete, a female representative of a majority-owned heavy construction business replied that they range from small contracts (about $100,000) to larger projects (up to $6.5 million). [#15]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the firm's contracts range from $200 repair jobs to $2 million projects. [#22]

- When asked about the sizes of contracts her firm pursues, the white female owner of a DBE-certified consulting firm indicated that she typically runs about 10 to 12 projects at a time, with contracts ranging from $1,000 to $100,000. [#24]

- A white female owner a DBE-certified engineering and consulting firm reported that the firm has done large projects throughout Montana, though their "bread and butter" tends to be smaller jobs. [#38]

For a few, smaller projects do not pay off, or certain job sizes are more realistic when seeking work. For example:

- The white female owner of a DBE-certified consulting firm mentioned that a challenge regarding smaller contracts is that "you spend a lot of money and time doing stuff that you never get paid for." [#24]

  The same female business owner went on to say that she would be up to the challenge of completing any size of contract, though realistically she would likely not go over $1 million. She added that a challenge specific to larger contracts is that they require organizing a team and having a variety of resources. [#24]

Business location and work territory. The study team asked about the geographic areas where companies perform work.

Many businesses reported that geography of work location is not an issue, and that they are often willing to travel to where the work is. [e.g., #21, #23, #26, #38, #35] For example:

- A white male representative of a trade organization reported that the majority of their membership performs transportation-related work, and thus travels statewide regularly. [#TO2]

- A Native American male owner of a DBE-certified consulting firm reported that the firm's willingness to travel is a key factor to success. [#6]

- The white female owner of a DBE-certified specialty contracting business stated that some business areas in Montana are very remote; because they often drive long distances for business meetings, they expanded to other areas so that they could perform work along the way and not lose money on travel. [#1]

- When asked where in the state he performs work, a white male owner of a SDVOSB-certified engineering firm responded, "Wherever we can get a job is where we do the work." He added that they are willing to travel [long] distances for projects. [#9]

- When asked where in the state they primarily work, a female representative of a majority-owned construction company indicated that they work throughout all of Montana. [#20]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the firm works all over Montana. [#22]

- A white male representative of a DBE-certified woman-owned contractor reported that his firm travels wherever necessary to do the work. [#31]

- When asked where in the state they perform work, a white female owner of a DBE-certified specialty contracting business replied that they go wherever the work is. She added that they bid jobs based on their capabilities rather than the location of the project. [#32]

- A white female owner of a DBE-certified construction firm indicated that they perform work all over the state, though they try to stay in the eastern part of Montana. [#30]

Some businesses that work in Montana also conduct work in other states. For example:

- A white female owner of a DBE-certified specialty contracting company reported that work location and geography has never been an issue for their firm, and noted that they are able to perform throughout the entire United States. [#40]

- A male representative of a majority-owned transportation-related firm reported that the firm has performed contracts all over the country. [#16]

- The Native American female owner of a DBE-certified consulting firm stated that because of the type of work she performs, she travels to many different states. [#18]

- The white female owner of a DBE-certified specialty consulting firm indicated that because much of her firm's work is phone-based, the geographic location of work does not affect her ability to perform. She went on to say that the firm has local, regional, national and international clients. [#37]

- When asked where in the state they perform work, the white female owner of a DBE-certified consulting firm replied that they work all over Montana as well as Idaho and Oregon. She added that they also completed a contract in South Dakota. [#33]

- A white male owner of a majority-owned specialty contracting firm reported that his firm has traveled throughout all of Montana, and to North Dakota and Wyoming to pursue work opportunities. [#41]

- The white female owner of a DBE-certified consulting firm reported that the majority of their work is in North Dakota, though Montana is a close second. [#29]

For some businesses, geography is an important consideration for any job. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor commented that the business tries to contract most of its work in eastern Montana, as it is the ideal geographical work area for their firm. [#2]

- A white female owner a DBE-certified engineering and consulting firm reported that her firm prefers to perform locally. [#38]

- A white male representative of a DBE-certified, woman-owned construction firm reported that the firm tends to limit its work to a single geographic region. [#10]

- The white female owner of a specialty contracting business stated that her firm prefers to work within their local area. [#36]

- The white female owner of a DBE-certified specialty contracting business reported that her firm prefers to work near their home office. [#27]

Business expansion or contraction. Periods of business expansion and contraction were common for interviewees.

Many business owners and representatives reported that their firms have expanded or contracted over time. [e.g., #3, #6, #7, #14, #15, #27, #33, #35] Some reported slow, steady expansion, while others reported large peaks and dips in staff size over time. For example:

- A Native American male representative of a majority-owned specialty contractor indicated that the firm has grown substantially over the last 20 years. [#5]

- When asked about any change in the types of work his firm performs, the white male owner of a DBE-certified specialty contracting business indicated that they expanded dramatically. [#17]

- A white male representative of a woman-owned engineering firm commented that the firm is expanding, and that it is "very much market driven." [#28]

- A white male manager of a majority-owned engineering firm reported that the firm has been on a steady growth pattern (5-10% increase annually) every year since he started with the firm. [#8]

- A white male owner of a majority-owned specialty contracting firm stated that his company grew slowly over time as they began to purchase additional equipment. [#41]

- A white male representative of a woman-owned engineering firm stated that they hire good employees; from there, the firm searches for applicable work. [#28]

- The Native American female owner of a DBE-certified consulting firm commented that the firm's size expands and contracts. She described a time when a sudden work opportunity demanded "better, faster, [and] bigger" work. In a period of three months, she hired about 18 people and maintained this level of staff for many years. She went on to say that after this time, there was a drop in work, and she had to lay off many of her staff. [#18]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that while the firm has grown, it has had "slowdowns" due to the economy, though it is now picking up again. [#22]

- A white male representative of a majority-owned engineering firm reported that the firm contracted by one-quarter during the recession. He added that they like to keep long-term employees, and do not like to lay off personnel. [#11]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the firm began with about ten employees for the first few years before their size gradually grew. He went on to say that their number of full-time employees has experienced growth as well. [#2]

- The Native American male owner of a DBE-certified specialty contracting company reported that they retained consistent staff size for three years until he realized that their bottom line was not good and they started to downsize. [#7]

- A white female owner of a DBE-certified specialty contracting business indicated that the size of the firm changes, as they typically hire on an "as needed" basis. She added that because of this, they sometimes lay off personnel; the size of the firm does not remained consistent. She went on to say that the business is "project driven" in terms of how many personnel they need, though they do feel more confident now about keeping staff employed. [#32]

- When asked if the company has expanded or contracted, the white female owner of a specialty contracting business replied, "Oh, definitely!" She went on to recall that she once sent out about 90 W-2 forms and had five to six projects going at the same time. She added that other times they would have about 20 employees over the course of the year. [#36]

Some interviewees reported more stability in their size and capacity. [e.g., #24, #34] Both business owners and trade organization representatives reported stability in size:

- The Native American female owner of a DBE-certified supplier indicated that there is only one other staff member aside from herself, and that there has been no change in the size of the firm. She went on to say that the firm does not typically expand or contract. [#19]

Employment size and staff development. Many business owners and representatives reported increases or decreases in staff, often resulting from work opportunities or availability of qualified workers. Sometimes, changes in staff size were seasonal.

Seasonal fluctuation in staffing. A number of businesses report seasonal drops in staff when work slows because of weather or other seasonal conditions. [e.g., #1] For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the size of the firm changes slightly based on season; and that the number of seasonal employees tends to decrease each year. [#2]

- When asked about the firm's slow season, a white male representative of a DBE-certified, women-owned specialty contractor reported that the firm employs college students on a seasonal basis. [#2]

- A Native American male representative of a majority-owned specialty contractor reported that the field employees generally work from March until November. A white male representative of the same firm added that during the winter, the firm drops from 250 to 50 employees. [#5]

- A white male representative of a majority-owned engineering firm reported that the firm expands and contracts seasonally. Employees in the summer tend to work overtime, while in the winter they drop to part-time. [#11]

- The white male owner of a consulting firm stated that some of their work is seasonal, which can make it difficult to keep people employed in the winter. February and March are their slowest months; after that, work begins to pick up. [#14]

- A white male representative of a woman-owned specialty contracting firm stated, "… we're definitely seasonal work." He added that during the summer, the firm hires high school/college students and teachers. [#23]

- A DBE-certified construction firm reported that the company traditionally contracts in the winter; they lay off employees (who draw unemployment during this time), though they come back when the weather is warmer. [#30]

- A white female owner a DBE-certified engineering and consulting firm reported that they have seasonal workers in the summer, and are busiest in May through October. [#38]

Some business owners or respondents from the availability interviews reported difficulty in finding qualified staff. [e.g., #AI112, #AI115, #AI210] For example:

- A respondent from a white woman-owned construction company indicated that it is sometimes "difficult" to find people to hire in Montana. [#AI174]

- A respondent from a majority-owned specialty contracting firm indicated difficulty in finding "trained labor" in Montana. [#AI47]

- A respondent from a Native American-owned specialty contracting firm commented, "It's difficult to find qualified employees." [#AI316]

- A respondent from a majority-owned engineering firm reported, "It's difficult to find qualified people to hire …." [#AI76]

- A respondent from a majority-owned specialty contracting firm indicated that "finding and retaining employees" is challenging. [#AI91]

- The white female owner of a DBE-certified specialty contracting firm indicated that it is difficult to find good help in her area with the unemployment rate at less than 3 percent. [#4]

- A respondent from a majority-owned specialty contracting firm reported, "The labor force is short in Missoula and Bozeman." [#AI265]

- The white female owner of a DBE-certified specialty contracting business reported that she sometimes has to lay off employees, making it difficult to retain good staff. She added that finding and keeping good staff is challenging. [#1]

Challenges to starting, sustaining or growing a business, including those that may be race-, ethnic- or gender-based. A number of businesses reported challenges when starting, sustaining or growing their businesses.

Some interviewees noted that starting up is the most difficult time for a business. Interviewees mentioned inexperience or fear of running a business, networking, obtaining financing, finding time to complete all the necessary paperwork, marketing and a number of other issues as particularly difficult while starting up. [e.g., #37] For example:

- The Native American male owner of a DBE-certified specialty contracting company reported that his inexperience with running a business was his biggest challenge at start-up. [#7]

- The white female owner of a DBE-certified consulting firm indicated that initially, the responsibilities of looking after a business (e.g., bookkeeping) was a challenge because she had not done that type of work as an employee with her previous firm. [#33]

- A white male owner of a SDVOSB-certified engineering firm indicated that the biggest challenge he faced when starting his small business was confronting his fear of starting a business. [#9]

- The white female owner of a DBE-certified design firm reported that networking and managing finances made her business start-up difficult. [#26]

- The white female owner of a DBE-certified specialty contracting business commented that like all small business start-ups, they experienced challenges with start-up financing and cash flow. [#27]

- A white male owner of a majority-owned construction firm recalled that they faced financial challenges at start-up. While one of their partners helped with financial support, the other did not. [#13]

- A white female owner a DBE-certified engineering and consulting firm reported that the challenges the other owner faced involved financing, as well as establishing multiple business locations. [#38]

- A Native American male owner of a DBE-certified consulting firm reported that it is a challenge to have enough capital, patience and tenacity to keep up with all the paperwork at start-up. He added that if a firm can make it through the start-up period, they have a good chance of succeeding as a business. [#6]

- A respondent of a majority-owned construction company reported, "[There is] too much red tape, registrations and paperwork nonsense; for someone starting now, it would be an insurmountable task. It would be nearly impossible for a new company to start up." [#AI73]

- When asked about any challenges they faced starting the firm, the white female owner of a DBE-certified specialty contracting business replied that both owners held full-time jobs in other industries, so finding the time to work on the firm's business operations and complete the certification process was challenging. [#3]

- The white female owner of a DBE-certified consulting firm indicated that "breaking into the market," diversifying and maintaining a relationship base is a challenge for any business, big or small. [#24]

- A white female owner of a DBE-certified specialty contracting business reported that one of the biggest challenges is getting their name out in the marketplace. She added that no one gave them the "time of day" when they made their first few bids. [#32]

- The white female owner of a specialty contracting business indicated that the biggest challenge of starting a business was acquiring work for a price that allowed them to make a profit. [#36]

- A white male representative of a trade organization reported that being competitive at business start-up is one of the biggest challenges that emerging businesses face. He went on to say that because more national firms have moved to Montana in recent years, many small businesses have struggled to remain competitive. [#TO2]

Some considered access to capital an ongoing challenge. [e.g., #6, #20] For example:

- A white male representative of a DBE-certified, women-owned specialty contractor commented that when the business first began, the owners went to several banks and "pretty much begged to get a loan" to get the business started. [#2]

- The white male owner of a consulting firm reported that financing, achieving name recognition and acquiring loans are difficult for his firm. [#14]

- A respondent from a majority-owned specialty contracting firm indicated the need to have "enough capital to expand." [#AI41]

Some business owners reported start-up difficulties specifically related to their status as a woman- or minority-owned business. Comments include:

- When asked if there are specific barriers for woman-owned businesses, the Native American female owner of a DBE-certified supplier replied, "… definitely, yes." [#19]

- The Native American male owner of a DBE-certified specialty contracting company reported, "Definitely … I felt … resentment right away." He added that the resentment came from competitors and firms close to his firm's location. [#7]

- The white female owner of a consulting firm indicated that at start-up, she faced the challenge of working in a male-dominated field. She commented, "In some degree … the industries … I serve are dominated by men." She went on to indicate that she faces the same challenges now that she is established, but they have less effect on her. [#21]

- A white male representative of a DBE-certified, women-owned specialty contractor stated that cost is a barrier for a small, woman-owned business at start-up. He said, "You pay a higher interest rate … than larger, established companies …. You pay a higher bonding rate …. There's just more expenses … to do the same work …." He went on to indicate that one you have history, the high bonding requirement "comes down." [#2]

- The white female owner of a DBE-certified specialty contracting business indicated that when she approached a banker with whom she had a previous business relationship to discuss her new specialty contracting business, the banker requested to meet with her husband, despite his having nothing to do with the new business. She added that the banker took her husband out for coffee to discuss the venture, and never asked her directly about her business plans. [#1]

- The white female owner of a DBE-certified consulting firm reported that the original owner faced challenges with financing in the 80s and 90s; her male partner had to intervene to secure a loan for the firm. When other problems arose, such as a client not wanting to work with a woman, the male partner would "take the lead." She went on to say that the challenges of a single woman-owned firm were "… ameliorated because there was a male voice there." [#29]

- The white female owner of a specialty contracting business indicated that despite the advantage of having previous experience in the industry, it oftentimes did not matter. She added, "They just didn't like a woman out there." [#36]

- A white female owner of a DBE-certified construction firm stated that she faced ongoing challenges as a woman business owner. She commented, "Anyone can start a business … but with me being a woman, [it's been] a definite challenge in the … industry." [#30]

A few of those interviewed reported not experiencing any challenges related to race or gender at business start-up. [e.g., #3, #33, #35] For example:

- A white female owner of a DBE-certified specialty contracting business indicated no challenges, mainly because she has more of a behind-the-scenes, or "background" role in the business. [#32]

- The white female owner of a DBE-certified consulting firm stated that she had not encountered any challenges specific to minorities or women when starting a business. [#24]

- The white female owner of a DBE-certified specialty consulting firm reported that in her field, it is "more acceptable to be a woman." Because of this, she added, she did not experience any specific barriers or discrimination regarding her gender. [#37]

- The white female owner of a DBE-certified consulting firm noted that she did not experience challenges as a woman after taking over the firm, as "… the world has changed quite a bit …." She added that when she took over the firm, women-owned firms accounted for more than 20 percent in the industry; she considered 20 percent to be the "the tipping point" where people realized that women were "here to stay." She went on to say that the majority of professionals in her field are now women. [#29]

- A white male owner of a majority-owned specialty contracting firm indicated that he is not aware of any additional difficulties for minorities or women when starting a business. He went on to say that he is aware of a woman who started a transportation-related company with no prior experience, and that she has been very successful. [#41]

Some interviewees said there were advantages to being a minority- or woman-owned business. [e.g., #14, #36] For example:

- A male representative of a majority-owned transportation-related firm reported that in the private sector, there are now benefits to being minority- or woman-owned firms because they receive variants in rates. He added that when all other factors are the same between firms, the minority- or woman-owned firm receives the job. [#16]

- When asked about any additional challenges as a woman-owned business, the white female owner of a DBE-certified consulting firm stated that while she works primarily in male-dominated fields, she has not experienced any difficulty obtaining work. She added that her firm is more recognizable because it is woman-owned, which can be beneficial. [#24]

However, some other interviewees reported challenges specifically related to being a small business. Comments included:

- A white male manager of a majority-owned engineering firm reported that starting a small business with only three engineers was very challenging. He remarked that they did not have the support staff typically needed to compete or the work history. [#8]

- As a small business, the white female owner of a consulting firm reported that it is difficult to compete for large projects unless part of a larger team. She added that it is difficult to "capitalize growth" to compete at a higher level. [#21]

- The white female owner of a DBE-certified consulting firm reported that tracking opportunities, marketing and focusing on quality are hard for one person. [#25]

- A white male representative of a woman-owned specialty contracting firm stated that maintaining safety and following OSHA rules are particularly challenging for small businesses. [#23]

C. Economic Conditions affecting the Transportation Contracting Industry in Montana

Economic conditions, good or bad, have a reported effect on contracting businesses in Montana. In Part C, discussion includes the following:

- Local effects of the economic downturn; and

- Current economic conditions.

Local effects of the economic downturn. Interviewees reported on the local effects of the most recent economic downturn.

For many, the Great Recession had negative impacts, some of which were lasting. [e.g., #11, #19, #22, #25, #26, #33, #37] Many interviewees reported that decreases in overall quantity of work affected their firms. Comments included:

- When discussing the economic downturn, a white male representative of a DBE-certified, women-owned specialty contractor stated, "I think it hit everybody pretty equally." [#2]

- When asked if the economic downturn affected his firm, a white male representative of a woman-owned engineering firm responded, "Very much so." [#28]

- When asked about the effects of the economic downturn, a white male owner of a majority-owned construction firm stated that it had a significant effect, and that revenue was down about 50 percent. [#13]

- The white female owner of a consulting firm reported that companies experienced difficulties capitalizing projects during the economic downturn. [#21]

- The white female owner of a DBE-certified specialty contracting business reported that the firm was "scrambling" to make equipment payments during the economic downturn. She went on to say, 'We were practically begging for jobs." [#27]

- A male representative of a majority-owned transportation-related firm stated that their vehicles typically have a three- to five-year lifespan; however, because the firm kept them longer during the downturn, they now have nine-year-old vehicles in use. [#16]

- A white female owner a DBE-certified engineering and consulting firm commented that because of the economic downturn, the firm had to spread out geographically in order to find work; they had to look for work out of the state. [#38]

- A white male owner of a SDVOSB-certified engineering firm reported that he witnessed a lot of downturn in 2008. He commented that at that time, he was working on private sector projects and saw those projects struggle. He went on to say that securing similar work can still be a struggle. [#9]

- When asked about the effects of the recent economic downturn, a white male representative of a trade organization commented that 2011 and 2012 were the most difficult years for the organization. [#TO1]

Several businesses reported specifically that transportation work "took a hit" during the recession. For example:

- A white male representative of a trade organization commented that both the transportation and engineering industries "took a hit" during the economic downturn, especially in the commercial arena. [#TO2]

- The white female owner of a specialty contracting business reported that the economic downturn had a strong negative effect on firms performing transportation work. She commented, "… if Montana doesn't have the federal funds to do the highways, there is no work out there for us." [#36]

- A Native American male representative of a majority-owned specialty contractor indicated that the economic downturn substantially affected his firm. He added that they used to perform a lot of highway work for MDT, as well as public works and similar work. However, he noted that this type of work "went away in 2008," as they had only one MDT job in that year. [#5]

Several firms reported having to cut salaries or lay off staff in order to remain in business. For example:

- A female representative of a majority-owned heavy construction business recalled that the staff took pay cuts, and there was a layoff. [#15]

- A male representative of a majority-owned transportation-related firm reported that the economic downturn was difficult. He explained that all of the employees took a 5 percent pay cut during the downturn in order to avoid layoffs. [#16]

- A white male owner of a majority-owned construction firm reported that he lost one employee because of the economic downturn, but has since hired another. [#13]

- The white female owner of a DBE-certified design firm commented that she "had to sacrifice some pretty good employees." She reported that her firm relies on "intellectual property," and that letting staff go is a factor in losing firm assets. [#26]

One owner said her firm had survived the downturn due to a single, large contract. For example,

- When asked if the firm experienced a drop in work during the downturn, the white female owner of a DBE-certified specialty contracting business reported that in 2009, the firm had one large contract that kept them in business. [#1]

Some business owners and managers said they have seen much more competition during the economic downturn. For example, some said increased competition stemmed from other firms underbidding projects to keep working:

- The white female owner of a DBE-certified specialty contracting business reported that during the economic downturn of 2008 and 2009, businesses were underbidding each other for work. She added that she could not participate in underbidding because her firm did not have the capital, and they could not afford to underbid and lose money. [#1]

- A white male owner of a SDVOSB-certified engineering firm said that during the economic downturn, younger engineers were opening their own businesses to take "their piece of the pie," This made finding work harder for his firm. [#9]

A few business owners and managers said that their firms felt less impact by the economic downturn as others did. For instance:

- A female representative of a majority-owned construction company reported that their firm's work had not changed. She went on to say that certain construction did not seem to suffer from the economic downturn. [#20]

- The white female owner of a DBE-certified consulting firm indicated that her industry suffered no particular effects from the economic downturn in Montana. She went on to say that her firm has bad years every three to six years, and that this does not necessarily correspond with the national economy; rather, it tends to reflect the local economy. She further added that her regular clients have good indicators of projects they will have in the long term. [#29]

- A white female owner of a DBE-certified construction firm stated that they did not experience any effects of the economic downturn, for the business was still new, and they were "still getting their feet wet" at the time. [#30]

- A white female owner of a DBE-certified specialty contracting company reported that her firm did not experience any negative effects from the recent economic downturn. She went on to comment that their construction-based work helped keep them very busy. [#40]

- The Native American female owner of a DBE-certified contracting business reported that she did not see a big change in work resulting from the economic downturn. [#35]

- A white male owner of a majority-owned specialty contracting firm reported that his firm saw no impacts from the recent economic downturn. He went on to indicate that the variability in the types of work they perform likely helped them to stay busy. [#41]

- A white male manager of a majority-owned engineering firm reported that although the firm had a "pull-back," they still managed to hire eighteen staff at the time. He went on to say that the firm was able to acquire good staff while other firms were laying staff off. [#8]

- When asked about the economic downturn, the white male owner of a consulting firm reported that they did "okay"; he explained that they were "trying to trim our business size in advance of 2008." They ended up minimizing their staff in order to remain efficient, which had helped them through the economic downturn. However, this firm owner reported significant work loss in 2012 due to the economy, as well as some contracts either delayed or cancelled. [#14]

Current economic conditions. Many business owners and managers reported that economic conditions had not fully recovered.

Some interviewees said that they have not yet seen an upswing in market conditions, or that the recovery has not been what they had hoped it would be. For example:

- The representative of a trade organization reported that, since the recession, the private sector is recovering "regionally" with western Montana's recovery lagging eastern Montana. [#TO2]

- A white male representative of a majority-owned specialty contracting business reported that the firm completed all of its projects for the season, and that "there is not much on the horizon." He added that while the firm has work, it is not at the volume they need. [#5]

- When asked about the effects of the economic downturn, a white male representative of a DBE-certified, women-owned specialty contractor stated, "The dollars have stayed the same … probably for about 12 years. Well, obviously you can't do as much work for the same dollar … so there's not as much work out there anymore. And, there's still the same amount of dollars of work, but there isn't as much work as there used to be." [#2]

- A white male owner of a SDVOSB-certified engineering firm indicated that the current conditions are challenging, and that larger firms have been taking over municipal work. He added that in the public sector, work in the cities is difficult to get, though counties tend to offer more opportunities. [#9]

- The Native American female owner of a DBE-certified supplier reported that there is currently a downturn in her industry, which is affecting her business more than the downturn of 2008. [#19]

- The white female owner of a consulting firm reported that because commodities are down, she is trying to grow her firm carefully. She added that she is not in favor of the paradigm where a poor market means that staff is let go. [#21]

- A white male representative of a DBE-certified woman-owned contractor reported that because the current economic conditions seem to be getting worse, it is now tougher than ever to get work. [#31]

- When asked about the current economic conditions, the white female owner of a specialty contracting business commented, "I don't think [they're] good at all." [#36]

Some reported specifically that in absence of a long-term federal highway transportation bill, work is still limited in that arena. For example:

- Based on conversations he has had within his district, when asked how the current conditions of the transportation industry are, a white male manager of a majority-owned engineering firm stated that conditions are bad. He went on to say that there is no federal highway transportation bill, and that state funds are down. [#8]

- A Native American male representative of a majority-owned specialty contractor reported that without the highway bill, the current highway market is "kind of grim." However, he went on to say that the private market and some public works are coming back in the Valley. [#5]

- The Native American male owner of a DBE-certified specialty contracting company reported that surprisingly, his firm did quite well between 2008 and 2013; however, the last three years have been challenging. He added that the current economic conditions are not good, and noted that larger firms are competing for smaller projects due to highway work cutbacks, which in turn limits his own firm's opportunities. [#7]

- The white female owner of a DBE-certified design firm reported that not having a long-term transportation bill affects the current economic conditions. She added that MDT has pulled many projects; it is doing the work internally in lieu of hiring consulting firms, which adversely affects her firm. She noted that now, with at least a three-year bill, MDT has can get start to get rid of the "roller coaster." [#26]

Others commented that they have started to see a slight upward trend in the market conditions, or the beginning of a healthy economy. [e.g., #29, #40] These businesses mostly reported cautious optimism:

- A white male representative of a woman-owned specialty contracting firm reported that the current economic conditions in Montana have experienced minor improvements, "a little bit." [#23]

- A white female owner a DBE-certified engineering and consulting firm commented that while the economy has picked up "a little bit," it is still "not what it used to be." [#38]

- A female representative of a majority-owned heavy construction business reported that the firm has demonstrated recovery each year since 2008; however, the profits still need to increase. [#15]

- A white male owner of a majority-owned construction firm reported that business is beginning to come back slowly. He added that they were busy in the summer, but predicted business slowdown in the winter. [#13]

- The white female owner of a DBE-certified specialty consulting firm commented that the economy in Montana is better than it had been, especially when compared to other states. She added, "[The current economy is] okay, it's not great, but it's not bad." [#37]

- When asked about current economic conditions, a white male representative of a trade organization reported that market conditions have improved since 2012, though he mentioned that conditions still vary by geography. He went on to say that overall, there has been an increase in construction work throughout Montana. [#TO1]

Some Interviewees reported that the current conditions had substantially improved. [e.g., #1, #4, #20] For example:

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor commented that the current economic conditions are "fairly good." [#22]

- The white female owner of a DBE-certified consulting firm commented on the current economic conditions, saying that things are "definitely better" and "definitely improving." [#25]

- A white male representative of a majority-owned engineering firm reported that the firm has recovered from the recession. He went on to say that last year and this year have been good for the firm. [#11]

- A male representative of a majority-owned transportation-related firm indicated that the economic conditions have improved over the last two to three years. As evidence, he explained that employees have gotten back the 5 percent pay cut they took during the recession as well as COLA overtime. [#16]

- The white male owner of a consulting firm stated that 2013 ended up being their best year. Subsequently, they did even better in 2014, and he reported that things have been going very well this year. [#14]

- The Native American female owner of a DBE-certified consulting firm commented that in her line of work, it appears that more work is available. She stated, "It seems like there is more in Montana than there has been." [#18]

- A white female owner of a DBE-certified specialty contracting business reported that she finds the economic conditions to be good. She added that she sees a "healthy outlook" with jobs that are funded through state or federal bonds. [#32]

One trade organization representative reported on the impacts of the 2009 American Reinvestment Recovery Act (ARRA). He commented that the positive effects of ARRA may be "winding down" in Montana:

- A white male representative of a trade organization reported that current marketplace conditions are "good," and that the 2009 ARRA has helped to put people back to work by infusing funds into the public sector infrastructure; he added that many of these projects benefited membership because they were transportation-related. [#TO2]

  The same representative of a trade organization went on to say that the ARRA caused a "spike" in the public sector market, which is now subsiding. He added that the work currently coming from MDT is likely going to stay at a modest level as ARRA projects are "winding down." [#TO2]

D. Public and Private Sector Transportation Contracting in Montana

Interviewees reported on experiences with public and private sector work, and any similarities or differences. Part D includes:

- Public and private sector experience;
- Sector preferences;
- Barriers related to entry or work, and other challenges in private sector; and
- Barriers related to entry or work, and other challenges in public sector.

Public and private sector experience. Interviewees discussed their experiences in pursuit of public and private sector work. Most interviewees indicated that their firms conduct both public sector and private sector work.

Some firms reported primarily working in the private sector. Comments from the in-depth interviews include:

- A male representative of a majority-owned transportation-related firm reported that the firm performs primarily private sector work; however, they sometimes perform small public contracts locally. [#16]
- The white female owner of a consulting firm reported that while she performs work in both sectors, she does more private than public. [#21]
- A white male representative of a woman-owned specialty contracting firm stated that the firm works mostly in the private sector. He added that they primarily working for large corporations. [#23]
- The white female owner of a DBE-certified consulting firm indicated that her work is primarily in private industry and that from there, she has worked with other agencies by way of collaborations. [#24]

- A white male representative of a woman-owned engineering firm indicated that the firm works primarily in the private sector. [#28]

- The white female owner of a DBE-certified consulting firm reported that the majority of their work is private. When asked why most of her work is in the private sector, she stated that the federal government self-performs, and only occasionally does the highway department have a few small projects for the Bureau of Land Management (BLM). [#29]

- A white female owner a DBE-certified engineering and consulting firm reported that the firm performs mainly in the private sector. She went on to explain that this is because they have difficulty finding work through MDT; her firm submits proposals, but never secures the work. [#38]

- A white female owner of a DBE-certified specialty contracting company reported that her firm primarily works in the private sector, as most of their work is for private clients. She went on to say that when her firm first became certified, they received a lot of public sector work because of the DBE goals requirement; when this was no longer a mandatory requirement, they found the private sector to be more profitable. [#40]

- A white male representative of a trade organization indicated that most of his members' work originates in the private sector, and noted that there has been an increase in private construction; this increase in private work is due to increasing private investments. [#TO1]

A number of interviewees reported work heavily weighted toward the public sector. Some business owners and representatives reported that the majority of their work is in the public sector. [e.g., #18, #32, #33, #36] For example:

- A Native American male representative of a majority-owned specialty contractor reported that the firm performs mostly public sector work. [#5]

- A Native American male owner of a DBE-certified consulting firm reported that 75 to 80 percent of their work is with federal or other public agencies. [#6]

- The white female owner of a DBE-certified design firm reported that two-thirds of their work is in the public sector, at the local, federal and tribal levels. [#26]

- The Native American male owner of a DBE-certified specialty contracting company reported that public sector work accounts for close to 90 percent of their work. He added that recently, with tribal work slowing, his firm has had to reach out for small private sector jobs to maintain their bottom line. [#7]

- The white female owner of a DBE-certified specialty contracting business reported that the firm performs both public and private sector work with about 90 percent of the work being in the public sector. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the firm performs 95 percent public sector work and 5 percent private sector work. [#2]

- The white female owner of a DBE-certified specialty contracting business reported that the firm works primarily in the public sector (96%). [#3]

- A white male representative of a DBE-certified woman-owned contractor stated that the company performs work in both sectors, with more public than private. Only about 5 percent of their work is in the private sector. [#31]

- The Native American female owner of a DBE-certified contracting business commented that she performs less than 1 percent private sector work. She stated, "It's pretty much what we've always done … it's almost always state and federal work." [#35]

Many interviewees reported variability in where their work originates. [e.g., #10, #11, #19, #22, #30, #34] Comments include:

- The white female owner of a DBE-certified specialty consulting firm reported that her firm performs both public and private sector work, and added that it can be difficult to be a "niche" market in Montana. However, because of the services her firm offers, she is able to perform contracts in both sectors. [#37]

- The white female owner of a DBE-certified specialty contracting firm reported that the sector where the firm works most often varies; however, both sectors are equally busy now. [#4]

- The white female owner of a DBE-certified consulting firm indicated that her primary work is now in the public sector; however, she still works in the private sector occasionally. She added that her work stems from available opportunities. [#25]

- When asked if they do public or private sector work, a white male owner of a majority-owned construction firm reported that they do both; they perform about 70 percent in the private sector and 30 percent in the public. [#13]

- The white male owner of a consulting firm responded that his firm conducts about equal work in both sectors. They prefer the mix because it creates a more diverse market base, which makes it more stable for them. He went on to note that after the last couple of years, they have picked up a more government work. [#14]

- A female representative of a majority-owned heavy construction business reported that the firm performs both private and public sector work, with public sector jobs being the largest. She added that there has been an increase lately in returning customers in the private sector. [#15]

Some businesses that worked in both public and private sectors reported differences between those sectors. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the government requires a lot of information in the public sector. He commented, "[There are] lots of hoops to jump through … a lot of paperwork to be filled out …." He went on to say that this unfairly affects small businesses that lack the resources for time-consuming paperwork. [#2]

- A female representative of a majority-owned construction company that works in both sectors reported that with the private sector, the firm typically receives a call about work. In the public sector, they rely more on "the bidding system." [#20]

- A white female owner of a DBE-certified construction firm reported that the private sector is unique because the customers rely on quotes for the jobs, and as long as they receive quotes, they tend to be "satisfied with the work." [#30]

- The white female owner of a DBE-certified consulting firm indicated that work in the private sector requires a focus on bottom line financial results. She added that conversely, the public sector focuses on the value that the work is bringing. [#25]

- A female representative of a majority-owned heavy construction business reported limited compliance with guidelines in the private sector. She explained that, at times, some firms ignore contract specifications, and thus overall accountability. [#15]

- A white female owner of a DBE-certified engineering and consulting firm stated that developers are smart and have a lot of money, and that they can always find workarounds for laws and regulations. She went on to say that this proved to be an ethical issue for her. [#34]

- The white male owner of a DBE-certified specialty contracting business indicated that the timeliness of private sector payment is much faster than payments through the state. [#17]

Some other interviewees reported little difference between public and private sector work. Comments included:

- When asked if there were different experiences between the public and private sector, a white male owner of a majority-owned construction firm stated that there were no differences. He added that the challenges between the public and private sectors are similar. [#13]

- A male representative of a majority-owned transportation-related firm reported that the challenges are no different in the public or private sector. He went on to say that there is no particular reason why they do not do much public sector work. [#16]

- A white male owner of a majority-owned specialty contracting firm reported that his firm performed equally in both sectors over the past year. He added that large public construction jobs are good because they keep all of his employees busy, while private jobs are good because they can perform multiple projects and finish them quickly. [#41]

- A white male representative of a trade organization reported that the challenges businesses face are nearly identical in both sectors; the most important factor is that a business owner has "business sense." [#TO1]

- A white male representative of a trade organization reported that there is not a clean "dividing line" between sectors because nearly all private sector work includes at least some public sector work. For example, he noted that many private sector projects require water connections, sewer connections and road improvements. [#TO2]

Sector preferences. A number of business owners reported on sector preferences. Some preferred working in private sector and some preferred working with public agencies.

Some business owners and representatives reported a preference for private sector work. Some interviewees reported that private sector work had fewer requirements. For example:

- A white male owner of a SDVOSB-certified engineering firm commented that it is easier to work in the private sector because "you don't have a bureaucracy to deal with." He added that in the private sector, the firm meets with the client, determines their needs, creates the designs, gets contracts and permits, and builds. With the public sector, he remarked, "It is a lot more meetings … a lot more waste of time … everybody's got an opinion." [#9]

- A white male representative of a majority-owned engineering firm noted that it is easier for a small firm to break into the private sector and build relationships. In the private sector, he commented that finding work depends on cost, location, word-of-mouth or prior experience with the client. [#11]

- The white female owner of a DBE-certified consulting firm commented that when working in the private sector, the firm does their own work; meanwhile, when working with some public sector agencies, "someone is looking over your shoulder" [#29]

- A white female owner of a DBE-certified specialty contracting company expressed that her firm prefers to work in the private sector because it tends to have higher profit margins. She added that it has also been more difficult to secure work in the public sector ever since the DBE goals requirement became non-mandatory. [#40]

Others reported a preference for working in the public sector. Comments include:

- When asked why the firm performs more public sector work, a Native American male representative of a majority-owned specialty contractor responded that heavy highway work is the firm's "mainstay" with state and federal work. [#5]

- The Native American male owner of a DBE-certified specialty contracting company reported that the work with BIA is clear and structured, whereas private sector work is open-ended and "unpredictable." [#7]

- A white female owner of a DBE-certified engineering and consulting firm said that public sector work is preferable because it is "recession proof." However, she noted that the projects are more challenging. [#34]

- The white female owner of a specialty contracting business stated their preference is to perform mostly public work. They perform very little private work simply because the profit is not there. [#36]

One trade organization representative reported on his members' preferences. For example:

- When asked about sector preferences for his members, a white male representative of a trade organization reported that there are few differences between sectors and that members base their decision to work in one sector over the other based on previously established relationships with clients or agencies. For example, he went on to say that MDT frequently reaches out to member firms that they have worked with in the past. [#TO2]

Barriers related to entry or work, and other challenges in the public sector. Many business owners reported various barriers and challenges to working in the public sector. Some reported specific challenges to securing work with MDT.

Some reported challenges, in general, when trying to gain entry to the public sector. Comments included:

- A white male representative of a woman-owned engineering firm indicated that it is very difficult for their small business to compete against larger firms in the public sector. He added that larger firms have teams who specialize in writing proposals and create qualification statements. [#28]

- A white male owner of a SDVOSB-certified engineering firm indicated that, currently, public agencies have a selection process that does not give the agency the best engineers for their projects. He went on to observe a "slant" towards larger engineering firms, and commented that it is challenging when public agencies have "one-engineer jobs." Instead of hiring small engineering firms, they hire a single, large engineering firm with 20 or more engineers. [#9]

- A white male representative of a majority-owned engineering firm reported that he is more aware of barriers for small businesses in the public sector. The typical RFP process includes reporting qualifications and passing through a scoring routine; he added that even for his firm's size, it would be difficult to write a proposal that would make them appear as capable as a large, national engineering firm. He explained that in the case of a large project, they often team with a competitor to "bolster their resume." [#11]

- When asked about challenges in performing public sector work, the white female owner of a DBE-certified specialty consulting firm stated that it is difficult to "attach yourself" to large prime contractors. She added, "… in my line of work, I'm almost always a subcontractor …." [#37]

- When asked if there are any barriers for a smaller business, the white male owner of a consulting firm reported that the biggest disadvantage is that it is more difficult to have a presence when competing with large corporations; this applies to both the public and private sectors. [#14]

Some specifically reported entry barriers to working with MDT or other specified public agencies. For example, comments included:

- A white female owner a DBE-certified engineering and consulting firm reported never getting work with MDT; her firm submits proposals, but never wins the work. [#38]

  The same female business owner went on to say that her firm's small size affects their public sector opportunities, specifically with MDT. [#38]

- A respondent from a majority-owned engineering firm reported, "We have had difficulties being awarded projects with MDT due to our lack of direct work history with the agency." [#AI242]

- A respondent from a Native American-owned engineering firm reported, "We never see any opportunities for [industry specified] work with MDT." [#AI314]

- A respondent from a majority-owned engineering firm indicated that MDT is not spreading opportunities. They commented, "MDT does seem to have their favorites and [does not] spread work around like they used to." [#AI283]

- The white female owner of a DBE-certified consulting firm reported that her firm has a few small projects for the Bureau of Land Management. However, it is difficult to compete with "mom and pop" shops who do not have offices or employees, and who have much lower general and administrative costs when bidding on Bureau of Land Management projects. [#29]

Barriers related to entry or work, and other challenges in private sector. Many business owners reported various barriers and challenges to working in the private sector.

Several businesses reported challenges while trying to gain entry into the private sector. Comments from the in-depth interviews include:

- In private sector, the white female owner of a DBE-certified consulting firm reported that on occasion there is the perception that a one-person firm lacks credibility. [#25]

- A white male owner of a SDVOSB-certified engineering firm reported that large clients, like hotels, generally pick large engineering firms that they have previously worked with for their projects; the larger firms then do all the work. [#9]

- The white female owner of a DBE-certified consulting firm stated that there are "niches" of businesses in the private sector that are difficult to break into unless someone retires. She added that companies have loyalty to firms with which they have already worked, and reported that it is very difficult for start-ups in the industry. [#29]

- When asked about challenges in pursuing work in the private sector, a white male owner of a majority-owned specialty contracting firm stated that private sector work could sometimes be harder to find because there are rarely advertisements for those jobs. [#41]

Some other Interviewees noted no barriers to entry in the private sector. [e.g., #3, #22, #23, #37, #38, #40] Comments include:

- When asked about any barriers that can prevent minority- or women-owned businesses from finding work in the private sector, a white male representative of a trade organization indicated that although there have been challenges in the recent past, there is more opportunity now because "the market expanded," and "there's more room for 'niche' players." [#TO1]

- The white female owner of a DBE-certified specialty contracting business commented that she does not experience challenges in the private sector because, "[We] just want to get the job done." [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that it is easier to work in the private sector for a small firm because there are fewer "hoops" to jump through. [#2]

- A white male representative of a DBE-certified, woman-owned specialty contractor commented that the only barrier is whether a firm can do the work in either sector. [#27]

Some business owners and representatives commented on challenges specific to new, small or women- and minority-owned businesses trying to find work in either sector. Public sector entry barriers reported, by many, included paperwork, difficulty meeting bonding requirements, or just competing against larger or more established firms.

Some businesses mentioned paperwork and regulations more suited for larger firms with greater resources as barriers. For example:

- The white female owner of a DBE-certified consulting firm reported that the barrier to working in the public sector is the amount of paperwork geared towards large firms. [#25]

- A white female owner of a DBE-certified specialty contracting company said that the amount of paperwork required for state jobs is overwhelming and too time consuming for small firms. [#40]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that in the public sector, there is a huge disadvantage for small firms. He commented that the rules and regulations, and at the state level, hoops to jump through, are barriers for small businesses in the public sector. [#27]

- The white female owner of a specialty contracting business indicated that correctly filled out paperwork makes a big difference to contractors. [#36]

A few mentioned that competition from larger and better-equipped firms, or those having previously established relationships created entry barriers for small businesses and minority- and women-owned businesses. For instance:

- A white female owner of a DBE-certified specialty contracting company reported that it is difficult for small firms like hers to bid against larger, more established businesses with better equipment. [#40]

- When asked about barriers to public sector work for minority- or women-owned firms, a white female owner a DBE-certified engineering and consulting firm stated that contractors work with whom they are comfortable, and that in her experience there does not seem to be positive feelings toward women-owned companies (although this may be changing). [#38]

A few reported on financing and bonding as barriers to working in the public sector for small businesses and minority- and women-owned businesses. Comments included:

- When asked about barriers to working in the public sector, the white female owner of a specialty contracting business responded that there is always going to be the issue of having enough funding to wait the 90 days before they receive their first check. She added that any small business is going to have this problem. [#36]

- The Native American female owner of a DBE-certified contracting business reported difficulties for minorities when they try to acquire financial help and bonding. [#35]

- The white female owner of a DBE-certified specialty contracting firm reported that, as a small woman-owned business, she considers the bonding required by public sector projects a barrier to entry. She added, "For us it [bonding] has been virtually impossible." The high requirements of available cash and line of credit are the major cause of barriers to securing the required bonds. [#4]

A few interviewees and availability interview respondents reported no barriers to entry into the public sector for small businesses and minority- and women-owned businesses. [e.g., #25, #41, #TO1, #TO2].

- A white male representative of a trade organization reported that it is easiest for DBE-certified minority- and women-owned firms to find work in the public sector because of the goals program. This acts as a "gateway to the marketplace," but they still have to maintain a reputation for being dependable and provide quality service. [#TO2]

E. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Experience as a prime contractor;
- Experience as a subcontractor;
- Experience working as both a prime contractor and a subcontractor;
- Preference for prime or subcontractor role; and
- Barriers reported by small businesses and minority- and women-owned businesses.

Experience as a prime contractor. Business owners and representatives discussed their experiences working as prime contractors.

Some firms reported that they are a prime contractor for a majority of their work. [e.g., #2, #10, #11, #17, #18, #19, #28, #31] For example:

- When asked about working as a subcontractor or as a prime, a white male owner of a majority-owned construction firm responded that they try not to do subcontract work. However, although not interested in subcontract work, the firm will sign a service contract. [#13]
- The white male owner of a consulting firm responded that most of their work is as a prime, about 70 to 75 percent. Due typically to the nature of the work, the remaining quarter is subcontracting. [#14]
- The white female owner of a consulting firm reported that the firm is mostly a prime contractor with a few subcontracts, and occasionally works as part of a team. [#21]
- A white male representative of a majority-owned engineering firm reported that when working with MDT, his firm is usually the prime consultant. [#39]

Some prime contractors noted that they usually perform all of the work or subcontract only small portions of a project. Comments include:

- A Native American male representative of a majority-owned specialty contractor reported that the firm primarily works as a prime contractor and self-performs a majority of the work. [#5]
- A white male representative of a DBE-certified woman-owned contractor indicated that the company is mostly a prime contractor and that they mostly keep the work in-house. [#31]
- A white male representative of a majority-owned engineering firm reported that the firm attempts to sub out as little work as they can because in-house is more profitable. He

commented that when the firm continually subcontracts a certain type of work, it tries to develop those skills in-house. [#11]

- A white male owner of a majority-owned construction firm expressed that they would very seldom subcontract work out. He commented that if they need a specialist they would hire a specialist and put them on the payroll for a short period. [#13]

- A white male representative of a majority-owned specialty contracting business reported self-performing much of the work unless there is a staffing issue and then the firm subs out a particular type of work they do not do themselves. [#5]

Many primes spoke about having established relationships with certain subcontractors. Most primes reported a preference for working with firms they have worked with in the past, some open to considering new firms if they appeared reliable. Comments from the in-depth interviews include:

- The white female owner of a DBE-certified specialty contracting business reported that a few years ago the firm hired a subcontractor. When asked how she found the sub, she responded that they approached someone they knew locally. [#1]

- The Native American male owner of a DBE-certified specialty contracting company indicated that he likes to subcontract to firms with whom he had past experience. [#7]

- According to a white male owner of a SDVOSB-certified engineering firm, when they subcontract work, they first want to know if a sub is interested in the work and has the skills to perform; and, if more than one subcontractor is interested in working on a project, they choose based on past "good" experiences. [#9]

- A white male representative of a majority-owned engineering firm reported that decisions to sub out work stem from the sub's prior work relationships, particular expertise or proximity to the client. [#11]

- A white male representative of a majority-owned engineering firm reported a particularly good relationship with a WBE and uses her firm often. [#11]

- The white female owner of a consulting firm reported that she has a group of subcontractors that she hires. [#21]

- The white female owner of a DBE-certified consulting firm replied that decisions on which subcontractors to work with depend on existing relationships, knowledge of the sub's work and any previous experiences working with the sub. [#24]

- The white female owner of a DBE-certified consulting firm reported that occasionally she subs out work to other firms choosing subs based on recommendations or prior experience with those individuals. [#25]

- A white male representative of a woman-owned engineering firm mentioned that the firm subs out work that they do not perform; past relationships influence the choice of those subs. [#28]

Some prime contractors reported "reciprocal" relationships with their subcontractors, sometimes priming and sometimes subcontracting with the same firm. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that if it has to sub out work, it works with a previously used firm. He reported having reciprocal prime and sub relationships with other firms. [#2]

- A white male representative of a majority-owned specialty contracting business reported that oftentimes the firm works as a prime to certain firms. It may also work as a sub to that same firm. [#5]

A few reported conducting some level of outreach to identify potential subcontractors. For instance:

- A white male representative of a majority-owned specialty contracting business indicated that no matter what public sector project they are bidding (federal, state, local), they advertise on the MDT website for DBE participation. In addition, they send emails to contractors they already know and ask for pricing. [#5]

- A female representative of a majority-owned heavy construction business reported that they have a list of the areas in Montana and from there they keep track of whom they bid to and who bids back to them. Based off what the company's requirements are for an upcoming project, they send out a draft of those requirements to listed subcontractors for return bids. To assess potential new subcontractor capabilities, she reported performing internet searches and calling suppliers to secure recommendations. She also added that sometimes they only self-perform work. [#15]

- A female representative of a majority-owned heavy construction business also mentioned that they sometimes receive unsolicited bids; they are not always sure if those bids are reliable. However, unless the firm has had a bad experience with a sub, her firm is open to working with new subcontractors. [#15]

Some reported evaluating potential subs based on their reputation in the industry. For example:

- The white male owner of a DBE-certified specialty contracting business indicated that they usually come to a decision based on a sub's reputation as well as observing the quality of the sub's firsthand. [#17]

- The Native American female owner of a DBE-certified consulting firm responded that she bases her decision to hire subcontractors on their work ethic. [#18]

- A white male representative of a majority-owned engineering firm reported that when hiring subcontractors in the engineering industry, their qualifications are the biggest factor in them getting the job. [#39]

- A white male representative of a trade organization reported that his members most often choose to work with subcontractors known for their skill and reputation; he added that low bids are also considered. [#TO1]

- The Native American female owner of a DBE-certified contracting business commented that they decide to sub out work if they feel someone is more suited to the job than they are; they work within an agencies guidelines. [#35]

- A white male representative of a trade organization stated that in the industry, subcontractors are hired based on qualifications, not low bid. [#TO2]

A few Interviewees spoke specifically about their experiences with minority- or women-owned firms and/or certified firms when subcontracting out work. For example:

- Speaking about working with minority- or women-owned subcontractors, the white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported, "There are no 'pros or cons,' it's how you do business." [#22]

- When asked about positive or negative experiences working with other minority-owned or small businesses, the white female owner of a DBE-certified consulting firm reported thus far her experiences have been good. [#24]

- Although her firm rarely subcontracts out work, a white female owner a DBE-certified engineering and consulting firm reported that they have had positive experiences working with minority- and women-owned firms. [#38]

- When asked about members' experiences working with minority- or woman-owned businesses, a white male representative of a trade organization commented, "Well, there are always those 'horror stories.'" He added that he is aware of some members requesting that MDT be more "rigorous" when certifying DBE firms for the type of work they are "allegedly" able to perform. [#TO1]

  The same representative of a trade organization went on to say that there have been incidences where certified DBE firms were ill prepared for projects. He made a point to note that this is not always the case, as there are several "small and woman-owned businesses" that are successful as well as capable. [#TO1]

Experience as a subcontractor. Business owners and representatives discussed their experiences working as subcontractors.

A few firms worked mostly as a subcontractor or subconsultant to other firms. [e.g., #3, #32, #34] Comments from the in-depth interviews include:

- The white female owner of a specialty contracting business indicated she has always worked as a subcontractor. [#36]

- A white female owner of a DBE-certified specialty contracting company reported that due to her firm's small size, nearly all of their work is as a subcontractor. [#40]

- The white female owner of a DBE-certified specialty contracting firm reported that the firm is generally a subcontractor. [#4]

- The white female owner of a DBE-certified design firm commented that most of the firm's work is as subconsultants; as compared with other industries, priming is more difficult in the transportation industry. [#26]

- The white female owner of a DBE-certified specialty consulting firm reported that while she has worked as both a prime and a subcontractor, she finds most of her work as a subcontractor. [#37]

- A white female owner a DBE-certified engineering and consulting firm reported that most of their construction-related work is as a subconsultant; they only perform as a prime on the rare occasion that they do specialty work. [#38]

- A white male owner of a majority-owned specialty contracting firm reported that his firm primarily works as a subcontractor. [#41]

- The white female owner of a DBE-certified specialty contracting business reported that they are typically subcontractors and rarely primes. [#27]

- A white male representative of a trade organization stated that most of their members work as subcontractors because they perform specialty work, or work that requires technical expertise; some of member firms even work as subconsultants to subcontractors. [#TO2]

Some subcontractors commented on whether they had a preference for working with particular prime contractors. Comments included:

- The white female owner of a DBE-certified specialty contracting firm reported that she prefers some loyal primes with contracts that are acceptable. [#4]

- The white female owner of a DBE-certified specialty consulting firm reported that she finds the majority of her work with a select group of primes that she has established relationships with over the years. [#37]

- The white female owner of a DBE-certified specialty contracting business expressed that she has been satisfied with and has established good relationships with all of the primes with whom she has worked, but is open to new relationships. [#1]

- The Native American male owner of a DBE-certified specialty contracting company noted that he has a list of preferred primes from whom they will subcontract work. On public sector projects, he reported to avoid primes that tell him upfront that the only reason they want his firm as a subcontractor on a project is his Native American-owned business status. [#7]

- A white female owner of a DBE-certified specialty contracting business reported to have good relationships with a number of the predominant primes in the state. However, she added there are some primes her firm rejects. [#32]

- The white female owner of a specialty contracting business commented that there are always certain primes that they prefer to work with and she will refuse to give a quote to certain contractors as well. [#36]

- When asked if his firm has preferences to work with certain primes, a white male owner of a majority-owned specialty contracting firm stated that his firm gets along with some personality types over others. [#41]

Some subcontractors described how they market to prime contractors and learn about opportunities. For example:

- A white male representative of a majority-owned engineering firm reported that there is a large variety of ways to obtain work as a subconsultant (for example, they hear about a project, other firms call them, they read legal ads, they see postings on websites, etc.). [#11]

- The white female owner of a DBE-certified design firm reviews legal ads and RFPs for public sector work. In addition, she subscribes to government e-notices, and alerts larger firms to potential opportunities and her firm's availability to team. [#26]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor commented that the firm learns of subcontracting opportunities through bid advertising. He added that primes seek them out for work and the business receives notification through DBE announcements. [#22]

- When asked how they learn about prime opportunities when they work as a sub, the white female owner of a DBE-certified consulting firm stated that they have received calls from primes. She added that they send out letters of interest to companies. She further stated that they do get some referrals from other clients. [#33]

- When asked how her firm learns about subcontracting opportunities, a white female owner of a DBE-certified specialty contracting company reported that they rely on word-of-mouth information and internet advertisements. [#40]

- A Native American male owner of a DBE-certified consulting firm reported that the firm learns of most opportunities by their relationships with the federal agencies. He added that they are well known with the federal agencies (BPA, BLM, Forest Service, Army Corp of Engineers, etc.) and are on lists with the federal agencies. [#6]

Experience working as both a prime contractor and a subcontractor. Business owners and representatives discussed their experiences working as both prime contractors and subcontractors.

Many firms that the study team interviewed reported that they work as both prime contractors and as subcontractors. [e.g., #8, #23, #24, #29, #37, #33] Comments from the in-depth interviews include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the firm works more often as a subcontractor, but serves as prime on some of the large jobs. [#2]

- A female representative of a majority-owned construction company indicated that they work as a prime and as a subcontractor depending on the type of work.

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the firm works as both a prime and subcontractor. He reported that their role depends on the size and type of project. [#22]

- The white female owner of a DBE-certified consulting firm reported working as both prime and subconsultant. She responded that whether she is a prime or sub depends on the work. She remarked that she is a prime when the job is strictly what she does; and, a sub to a team when her work is just a small piece of the overall project. [#25]

- The Native American female owner of a DBE-certified contracting business reported that they work as both a prime and a sub. For example, if they think a job fits the firm well then they will bid it as a prime contractor. She added that if the job is too large for her firm, and if she cannot acquire bonding, then she bids it as a subcontractor. [#35]

- A white male representative of a trade organization reported that most members perform as both prime contractors and subcontractors; their decision to work as prime or subcontractors depends on the type of work they are performing. [#TO1]

Preference for prime or subcontractor role. Several firms spoke about their preferences for prime contracting or subcontracting. For example:

- A white male representative of a majority-owned specialty contracting business commented that when working as a prime, the firm has greater control over the schedule. For example, he remarked that on a current bridge subcontracting job, where they are not in control of the schedule, they do not feel the project is progressing as well as they would like. [#5]

- A white male manager of a majority-owned engineering firm reported that in order to break into the market, the firm has started subconsulting to other consultants. He said they prefer to act as a prime, but in order to win prime contracts they need experience working with MDT that they can only get as a subconsultant. [#8]

- When asked about her experiences working as a sub or a prime, the white female owner of a DBE-certified consulting firm responded that they are different. She added that a prime is in charge of everything and there is more paperwork involved. As a sub, there is simply a task to complete "… just do this part, turn it in and walk away." [#24]

- When asked if they have any preference regarding primes to work with when they work as a sub, a female representative of a majority-owned construction company replied that they have no preference. [#20]

Barriers reported by small businesses and minority- and women-owned businesses. Business owners described challenges certain businesses face as prime contractors and/or subcontractors.

A number of small businesses and minority- and women-owned businesses reported barriers to working as prime contractors. Comments ranged from administrative challenges to project size to competition from "one-stop-shopping" providers:

- The white female owner of a DBE-certified design firm reported that it is difficult for small businesses and "micro-businesses" to secure priming opportunities in the public sector; a small firm must show "… manpower … horsepower … and have an office of 25 … 50 … 100 people … in order to be a successful prime consultant." [#26]

- The white female owner of a DBE-certified consulting firm reported that some challenges for small businesses working as a prime include dealing with resources, time required for proposals, statements of qualifications, and the costs associated with owning a business when there is only one person running the firm responsible for everything. [#24]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that a barrier for small businesses working as a prime contractor is an inability to bid large projects. [#22]

- When asked about barriers or challenges that small businesses and minority- or women-owned businesses face when pursuing work as a prime contractor, a white male representative of a trade organization reported difficulty for some smaller firms to meet the federal requirements associated with larger contracts. He added, for example, that it is often too demanding for smaller firms to comply with federal specifications. [#TO1]

- When asked to describe the challenges small businesses might face when priming, a female representative of a majority-owned heavy construction business replied that overhead and having enough people to run the job might be a challenge; a small company running a large project would be challenging. [#15]

- A white male representative of a woman-owned specialty contracting firm reported that challenges for small businesses exist on big projects (however, this has nothing to do with being woman-owned). [#23]

- The white female owner of a DBE-certified consulting firm explained that in her industry, it is difficulty to compete as a prime with larger engineering firms that can do all of the work in-house as "one-stop-shopping." [#29]

Some business owners said they had encountered barriers to obtaining work or working as a subcontractor. Barriers referenced size, certain stigmas and difficulty working with some primes. For example:

- A respondent from a white woman-owned consulting firm indicated difficulty getting subcontracting work, "Due to small size I am interested in primarily working as a subcontractor … I have difficulty finding prime contractors that are willing to subcontract work." [#AI368]

- The white female owner of a DBE-certified specialty contracting business reported that she had once contacted a prime who told her that the firm was too small to subcontract. [#1]

- When asked about barriers or challenges for minority- and women-owned businesses working as subcontractors, the white female owner of a DBE-certified specialty consulting firm commented, "Some of [the barriers come] with the territory, you're just small." [#37]

- A white female owner of a DBE-certified construction firm reported that from the perspective of the client, they might typically hire a firm that is larger, more recognized and thus, more qualified. She commented that because of that, it could be a challenge for any small company that is not well known. [#30]

- The Native American male owner of a DBE-certified specialty contracting company reported in the beginning they did many subcontractor projects with MDT and experienced many problems. He explained that many primes told him that as a subcontractor, "… you are always on the bottom … you get the scrap … whatever is left over … and you have no authority." [#7]

- The white male owner of a DBE-certified specialty contracting business reported that his firm is largely unsuccessful as a subcontractor; there is a stigma with his DBE label. "Oh, it's one of those businesses, it must be a 'woman-owned business,'" so when his firm tries to procure subcontract work they do not succeed. [#17]

- A white female owner of a DBE-certified construction firm reported having trouble when working with primes. She added that sometimes when they try to get documentation from them "it's like pulling teeth" and sometimes they "blow us off like we don't exist." [#30]

- A white female owner of a DBE-certified construction firm indicated that, as a subcontractor, the firm faces the barrier of general contractors' personalities when engaging women on the jobsite as their subcontractors. [#30]

- A white male owner of a majority-owned specialty contracting firm reported that his firm sometimes struggles to find subcontract work when primes are only looking to hire certified DBE firms. [#41]

- The white female owner of a DBE-certified consulting firm indicated there are some good IDIQs (indefinite delivery, indefinite quantity) that come out from federal agencies, which go to large primes that have many subs. She added that it is impossible for them to determine the primes are that are bidding on a job in order to contact them about the opportunity for subbing work. [#33]

A few reported no barriers to acting as a subcontractor. [e.g., #22, #25, #40].

F. Keys to Business Success and Any Barriers in the Way

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Discussion focused on:

- Reputation relationship building;
- Employees;
- Equipment and materials;
- Licensing and permits;
- Financing;
- Bonding;
- Insurance;
- Timely payment; and
- Other topics.

Reputation and relationship building. Many business owners identified relationship and reputation building as a key component to the success of their businesses. [e.g., #1, #6, #10, #15, #21, #24, #27, #31, #33, #38, #39, #40, #TO2]

Some owners and representatives commented on the importance of reputation to the success of their business. For example:

- A white male representative of a DBE-certified, woman-owned construction firm indicated that longevity is a key factor to the business' success. [#10]

- A Native American male representative of a majority-owned specialty contractor remarked that a key factor to success is the firm's long established reputation of getting work done in a timely fashion. [#5]

- A white male representative of a woman-owned engineering firm reported that dependability and honesty are key factors to the firm's success. [#28]

- A white male owner of a SDVOSB-certified engineering firm reported that developing a reputation for competence is a key factor to business success; in order to develop a good reputation, a firm must get project approvals and work done on time. He added, "It's [the firm's reputation for competence] pretty much keeping the client happy." He further explained that keeping the client happy means keeping schedules rather than taking them to lunch. [#9]

- A white male owner of a majority-owned construction firm expressed that they have a good name in the industry being "honest and fair." He added, "We've been at it a long time so we kind of know what we're doing." [#13]

- The white female owner of a DBE-certified specialty consulting firm commented that she has a good reputation, and that she gets "repeat business." She added that good work results in good relationships. [#37]

- A white female owner of a DBE-certified specialty contracting business indicated reputation and recognition for the quality of the work are factors of the firm's success. "… reputation, it's being known for the quality of the work … and we are being known as someone who can fulfill contractual obligations and does good work …." She also mentioned they have a good relationship with their suppliers and they pay their bills on time. [#32]

- The Native American female owner of a DBE-certified contracting business mentioned that they have been in the business for a while, they do a good job and people know that they can complete the work. [#35]

- The white male owner of a consulting firm responded that their reputation is a big part of their success. People can see that their company has been stable and around for a while. [#14]

- The white female owner of a DBE-certified specialty contracting business explained the firm's reputation as, "We do not slack or cut corners … there would not be a harder working company than our company." [#3]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that a good reputation in the industry and ability to perform the work are keys to the success of the firm. [#22]

Many businesses reported success building relationships through quality work and showing they can get the job done. Many emphasized work quality as a key factor in developing good relationships and a strong reputation. [e.g., #18, #20, #21, #38, #39, #40, #TO2] For example:

- The white female owner of a DBE-certified consulting firm commented that referrals from satisfied clients are key factors to her success. [#25]

- A white female owner of a DBE-certified engineering and consulting firm stated that once they got a job, they would do good work, prove themselves and the clients would always come back. [#34]

- When asked for the key factors leading to her firm's success, the white female owner of a DBE-certified specialty contracting business responded that they strive for good customer service and doing the work correctly the first time without the need for callbacks. [#1]

- The white female owner of a DBE-certified consulting firm indicated her keys to business success were positive relationships in the state based on reputation and experience completing projects. She added that with well-received products and good communication and relationships there is a higher likelihood that there will be more interactions in the future. [#24]

- The white female owner of a DBE-certified consulting firm reported that quality of work, knowledge, availability and communication with clients are key factors to her firm's success. [#29]

Employees. Business owners and managers shared comments about the importance of employees.

A number of interviewees indicated that high-quality workers are a key to business success. For many, good employees are keys to business success. [e.g., #7, #21, #23, #28, #30, #32, #41] Some comments follow:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that retaining employees is critical to success. He commented that several employees, including him, have been with the company for over 20 years. [#2]

- A white male owner of a majority-owned construction firm noted that employees are important to success. "We have really good personnel." [#13]

- A white male representative of a trade organization reported that the biggest key to his members' success being able to attract skilled personnel to hire. [#TO1]

- The white female owner of a consulting firm indicated that firms look to hire "people," not just consulting firms. [#21]

Many business owners and managers said that developing and maintaining relationships with their employees was paramount to achieving success. [e.g., #10] For example:

- A white male representative of a majority-owned engineering firm reported that their employees know that they are part of a stable, people-oriented company that is committed to growth and above average compensation. [#39]

- A female representative of a majority-owned construction company indicated that they have good employees; they keep them trained and up to date on the equipment they use. [#20]

- The white female owner of a DBE-certified consulting firm indicated that the quality of the work was more important than quantity; therefore, she limits her hiring so the firm does not lose the ability to mentor staff. [#29]

- A white female owner a DBE-certified engineering and consulting firm reported that many of their employees have been with the firm since it was first established, and that primes seek out her business because they know their employees are industry veterans. [#38]

Equipment and materials. Business owners and managers discussed equipment and materials needs, and access to pricing and credit for materials.

A number of businesses reported the importance of having the right equipment and materials for operating their businesses, and keeping it operational. [e.g., #1, #3, #7, #15, #20] For example:

- A white male owner of a majority-owned specialty contracting firm reported that having dependable equipment has been a significant contributor to his continued success. [#41]

- A female representative of a majority-owned construction company reported that the challenge is for the firm to have the right type of equipment required for the work they perform, and the employees with the right experience to operate the equipment. [#20]

- A white male representative of a DBE-certified, woman-owned construction firm noted that they own all of their own equipment. [#10]

Access to pricing and credit for equipment and materials was an issue for a few, and not an issue for others. For instance:

- When asked if she secured good pricing and credit when purchasing her equipment, the white female owner of a DBE-certified specialty contracting business responded that the business faced challenges getting a loan to start the firm; however, a member of the family helped them with financing. [#3]

- A white male owner of a majority-owned construction firm reported that sometimes they do not have the machinery required for jobs. He said that they could not afford to buy machinery in the market area. [#13]

- When asked if she was financing or paying cash for materials, the white female owner of a DBE-certified specialty contracting firm replied that vendors easily give her terms.

- A white male representative of a DBE-certified, women-owned specialty contractor reported that having relationships with others helped secure access to fair pricing and credit. [#2]

Licensing and permits. The study team asked firms about their experiences obtaining licensing and permits. Most had no issues obtaining licensing and permits. [e.g., #22, #27, #35, #36, #TO2] For example:

- When asked if she faces challenges with licensing and permits, the white female owner of a DBE-certified specialty contracting business responded that she has not faced any challenges because in most cases it is the prime's responsibility. [#1]

- Montana, unlike other states, does not issue licenses for [specified industry], according to the white female owner of a consulting firm. [#21]

- A white male representative of a DBE-certified woman-owned contractor commented that his experience related to licensing and permits has been good. [#31]

- A white male representative of a majority-owned engineering firm indicated no permit and licensing issues, "just paperwork issues." [#11]

- Speaking about obtaining licensing and permits, a white male representative of a woman-owned specialty contracting firm noted that "[the process] usually goes pretty smooth." [#23]

- The white female owner of a consulting firm further reported that she has not experienced problems with obtaining permits. [#21]

- The permits are easy to obtain, according to the white female owner of a DBE-certified consulting firm. [#33]

However, a few Interviewees did report challenges obtaining proper permits. Comments included:

- A Native American male representative of a majority-owned specialty contractor reported facing challenges getting certain permits in a timely manner. A white male representative of the same firm added that, at times, permits delay a project. [#5]

- A respondent from a majority-owned specialty contracting firm reported, "Permitting has been a nightmare in both the state and county; they put us past 90 days for a permit, it has been horrible." [#AI353]

- A white male manager of a majority-owned engineering firm commented that certain permits will sometimes be paid by MDT and sometimes will not. He added that permits should target professionals in the industry (not contractors); issuance of permits to nonprofessionals could negatively affect the project and schedule. [#8]

Financing. Many interviewees discussed the importance of access to capital. As with other issues, interviewees' perceptions of financing as a barrier depended on their experiences.

Some business owners reported that they had tapped personal resources to finance their business operations. Comments include:

- When asked if financing was a challenge at start-up, the white female owner of a DBE-certified specialty contracting firm responded that she did not have any capital and she relied on a loan from her mother and credit cards. She further commented that she finances new equipment now stating if not, "You get taxed to death." [#4]

- The white female owner of a DBE-certified design firm reported that her capital is not physical; it is intellectual. Therefore, banks rely on her personal credit and she has a low line of credit. [#26]

- The white female owner of a DBE-certified consulting firm reported she does her own financing through her pocketbook. [#33]

- A Native American male owner of a DBE-certified consulting firm reported that he and the two other partners pooled their funds to start the firm. [#6]

- The Native American female owner of a DBE-certified consulting firm mentioned that she never felt comfortable to go and get financing. "So pretty much, anything that I've done I've had to finance myself. Basically, you just start working." (In 2010, she received her first loan). [#18]

- The white female owner of a DBE-certified specialty contracting business reported that her need to secure credit for materials purchases impacts her personal credit history. She explained that the credit checks run on the LLC affects her personal credit. [#1]

Many interviewees said that obtaining financing was, and sometimes continues to be, a barrier for businesses. Interviewees reported difficulty finding new financing, or having recently lost lines of credit that they had secured in the past.

- A female representative of a majority-owned construction company reported that financial challenges are a barrier to business success, for small businesses and minority- and women-owned businesses. [#20]

- A white male representative of a woman-owned engineering firm commented that financing is hard for small businesses. He added that the firm rarely applies for financing. [#28]

- For the white male owner of a consulting firm financing has been difficult. The firm typically needs to borrow money to help with payroll and paying bills when work is slow; the firm ends up spending more than they are bringing in. He reported that the firm often goes in the hole in the early or late spring until enough revenue builds to become profitable later in the year. "It's typically cyclic …." [#14]

- A Native American male owner of a DBE-certified consulting firm reported community banks were not willing to lend to a tribal-owned firm. [#6]

Some interviewees reported that avoiding financing is the key to their success. For example, some reported very limited borrowing:

- A white male owner of a majority-owned construction firm reported that they had borrowed money in the last two or three years but never very much. Usually financing has been a small amount to tide them over on a project. [#13]

- A white male representative of a trade organization reported that a key to business success in the local marketplace for his members is having adequate capital without having to rely on financing. [#TO1]

A few business owners spoke about the importance of financial planning; one suggested delaying profits to ensure the health of the company.

- The white female owner of a DBE-certified specialty contracting firm indicated that a key to her success is meeting quarterly with her accountant to review revenue, expenses and taxes.. She plans "ahead financially." [#4]

- The white female owner of a DBE-certified consulting firm indicated that as she paid off the debt to buy the firm, she had an increase in tax liability. Now, she reported, she has a line of credit for $150,000 and her personal bank account has $100,000. She can always make payroll. [#29]

  To accomplish this, the same interviewee reported that she delays profits one year, every year in order to have funds to start the next year. She added that she uses profits from one year to pay taxes for the next year. She further remarked that three years of funds are required to make her business financials work. Because of this, she added, "I make the most money in a bad year … that's when I can build up my bank account …." [#29]

  The interviewee also remarked that a firm should not expect to make money in their first three to five years. [#29]

A few firms reported that obtaining financing was not a barrier. Firms reporting few barriers typically had established relationships with lenders or business longevity. [e.g., #5, #8, #23]

Bonding. Public agencies in Montana, including MDT, typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds on public construction contracts. Securing bonding was difficult for some, particularly newer, smaller and poorly capitalized businesses.

A few business owners spoke generally about the difficulty of obtaining bonds. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that bonding is a challenge at business start-up; however, the price comes down once the company is established. [#2]

- A respondent from a majority-owned specialty contracting firm reported, "If you can't borrow $250,000, you cannot get a bond for a $50,000 project; if you don't qualify for a certain credit amount you cannot get bonded." [#AI39]

- On the topic of bonding for his members, a white male representative of a trade organization commented that bonding capacity only increases when firms gain experience and reputation. [#TO1]

Some business owners and other representatives reported on their firm's difficulty obtaining bonding. Comments included:

- The Native American male owner of a DBE-certified specialty contracting company reported its biggest challenges as financing and bonding. [#7]

- The white female owner of a DBE-certified specialty contracting firm reported that, she faces challenges with bonding required by public sector projects. She added, "For us it [bonding] has been virtually impossible." When asked why bonding is so challenging for the firm, she responded that it is the financials; the high requirements of available cash and line of credit are the major cause of barriers to securing bonds. [#4]

- A white female owner of a DBE-certified construction firm stated that they have struggled with bonding requirements. The firm did not receive payment for the work they performed and this had an effect on its bonding; the firm faced termination from the public agency job. [#30]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that bonding through the bonding company is a major challenge. [#27]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the owners had trouble securing bonding, early on, and had to go to multiple companies before they had success. He said, "We've been in business for [over two decades], a lot of those barriers have gone away." He commented that the firm's consistency and quality of work also helped to remove barriers. He said, "Nobody's ever come back and had … to turn in a bond." [#2]

Some interviewees indicated that bonding requirements adversely affected small businesses' and minority- and women-owned businesses' opportunities to bid on public contracts. [e.g., #32, #33] For example:

- The Native American female owner of a DBE-certified contracting business indicated that bonding requirements are frequently difficult. She stated, "… bonding is a huge battle for almost every small company." [#35]

- A white male representative of a DBE-certified woman-owned contractor indicated that the only thing that limits the size of contracts they can handle is the bonding requirements. [#31]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the firm can get bonding, but it is more difficult for small firms because "… the purse is only so deep." He added that at times the firm could not bid on a project due to its bonding capacity. [#22]

- The white female owner of a DBE-certified specialty contracting business commented that bonding is a big issue for the firm. She indicated that bonding is difficult to secure as a relatively new firm, especially for the large jobs that they would like to bid. She added that bonding requirements have stopped the owners from bidding certain jobs and nearly cost them a contract due to lack of bonding. [#3]

- The white female owner of a DBE-certified specialty contracting business noted that bonding in the public sector presents barriers; many times, there are two to three years between bonding jobs. Getting the paperwork up to date, when needed, is challenging. [#1]

- The Native American male owner of a DBE-certified specialty contracting company reported that, early on, bonding was a barrier because of the firm's tribal ownership; the bonding agencies have no jurisdiction to recover liability losses from them. [#7]

- The white male owner of a consulting firm replied that they have had to do a bond for the Department of Environmental Quality (DEQ) and they have seen "zero" work from it. [#14]

A few reported that prime contractors relaxed their bonding requirements, on occasion. For example:

- In reference to small businesses, a white male representative of a majority-owned specialty contracting business stated that the firm requires all of their subs to secure bonds, because it has been "burned in the past." However, the firm substitutes letters of credit with some subs that have trouble securing bonds. He commented that bonding challenges a small business until that firm has established a history and has sufficient finances. [#5]

- The white female owner of a DBE-certified specialty contracting firm reported that her business has had to prequalify for a prime submitting to a public agency. She added that the biggest difficulty is to get a prequalification bond if it is required. She added that a large prime contractor with whom she works for often does not require her firm to secure a bond. [#4]

Other interviewees reported little or no problems in obtaining bonds, or that bonding was not required in their industry. [e.g., #7, #20, #29, #38, #39, #36] Comments include the following:

- A white male representative of a DBE-certified, women-owned specialty contractor reported no problem in securing different size contracts with public agencies. He reported recently bidding on a multi-million-dollar job, and being able to obtain the bonding for it. [#2]

- A white male representative of a majority-owned specialty contracting business reported that the firm has excellent bonding capacity. [#5]

- A white male representative of a majority-owned engineering firm indicated that obtaining bonding and insurance was "routine … no barriers." [#11]

- The white male owner of a DBE-certified specialty contracting business reported that they have not had an issue obtaining bonds. [#17]

- A female representative of a majority-owned construction company indicated that they have an excellent relationship with their bonding company and they do not have a problem obtaining bonds. [#20]

- A white female owner of a DBE-certified specialty contracting company reported that her firm is able to acquire bonding easily, and that they have never had any issues with bonding in general. [#40]

- When asked about bonding, a female representative of a majority-owned heavy construction business reported that they have a great relationship with the bonding company. Rates are good because the bonding company likes the firm's work. She added that they have a single bonding capacity of $10 million. [#15]

- A white male representative of a trade organization reported that to his knowledge, organization's members have not experienced issues regarding bonding capacity. [#TO2]

- The white female owner of a consulting firm noted that the services her firm offers are not construction or engineering; therefore, the work does not require bonding. [#21]

- A white male representative of a woman-owned engineering firm noted that, for the type of work his firm performs, there are "no requirements to get bonding." [#28]

Insurance. The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success. Some reported no barriers to securing insurance. [e.g., #3, #5, #7, #8, #23, #28, #30, #38, #35, #36, #TO1] Others said that insurance could be a problem.

Many interviewees said that they could obtain insurance, but that the cost of obtaining it, especially for small businesses, was a barrier to sustaining their businesses or bidding certain projects. [e.g., #38] Comments include:

- A respondent from a white woman-owned transportation-related firm reported that some insurance requirements are "too strict." [#AI8]

- The white female owner of a DBE-certified consulting firm reported that insurance requirements are difficult for a small business to afford. [#25]

- A white male owner of a SDVOSB-certified engineering firm commented that he can get insurance, but paying for it is challenging. He added that he adds the insurance costs to his bids. [#9]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that workers' compensation insurance rates could be high at the inception of a company, because a firm may not have the hours to secure a good rating. He said, "It takes time to get a better 'workman's' comp rate … the smaller the company is." He also commented that the workers' compensation costs drop considerably as the firm demonstrates lack of injury. [#2]

- A respondent from a majority-owned specialty contracting firm reported that new companies experience challenges obtaining insurance. He indicated, "For small businesses the cost is 'huge' [for workers compensation and other insurance requirements]; [the] insurance company makes more than our company." [#AI74]

- A white male representative of a trade organization indicated that meeting the requirements for professional liability insurance has been an issue for some of their members. [#TO2]

- When asked about insurance, a white male owner of a majority-owned construction firm replied, "Insurance is the biggest thing in [our industry]." He reported that they pay a high rate and had trouble getting insurance in the beginning. [#13]

- The Native American female owner of a DBE-certified consulting firm reported, "I think insurance is unreal because it costs so much." She added that so many different places require different types of insurance thus, whenever she goes to another project she has to buy more insurance. [#18]

- The white female owner of a DBE-certified specialty consulting firm commented that a recent city project requires insurance, and that she is currently experiencing difficulty in obtaining the necessary insurance. [#37]

- The white female owner of a DBE-certified consulting firm reported that the amount of insurance is a challenge for the size of contracts she secures in the public sector. [#25]

- When asked if insurance requirements in the public sector are difficult to meet, the white female owner of a DBE-certified specialty contracting firm replied that it is getting harder in the private sector due to the waiver of subrogation clauses in contracts. She added that every time she must send an insurance certificate to a prime or public agency it costs her firm $650 due to increased liability costs added to her policy — she does 2,000 jobs each year. [#4]

- The white female owner of a DBE-certified design firm reported that MDT's required insurance is $1,500,000 and a policy in that amount is not available for purchase. Policies come in million dollar increments, according to the interviewee. She added that most other state and local agencies allow a $1,000,000 policy; but Billings requires a $2,000,000 policy. [#26]

- Because the firm performs pre-construction work, the white female owner of a DBE-certified consulting firm reported that her industry requires a $5 million policy, which covers any MDT project. [#29]

- The white female owner of a DBE-certified consulting firm indicated that the risk they put to a public agency by their work and the amount they are required to pay for errors on omissions is "totally, stupidly out of proportion." [#33]

A number of firms reported that obtaining insurance is not a barrier for them. [e.g., #3, #5, #7, #8, #10, #23, #28, #30, #41] For instance:

- A white male representative of a DBE-certified, women-owned specialty contractor reported originally experiencing challenges with insurance requirements at the company's inception, but this is no longer an issue. He reported longevity with the current insurance company. [#2]

- A white male representative of a majority-owned specialty contracting business reported no issues with insurance requirements or obtaining insurance. [#5]

- A white male owner of a SDVOSB-certified engineering firm discussed the high cost of professional liability insurance, but reported no barriers with insurance requirements. [#9]

- A female representative of a majority-owned construction company commented that their experience obtaining insurance is good. [#20]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor commented that insurance is not an issue; it is a business requirement. [#22]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that insurance requirements are stringent, but they add the cost to bids. [#27]

Timely payment by the customer or prime. Full and timely payment by customers or prime contractors is critical to business success. Some reported non-payment and slow payment by the customer or prime contractor as a barrier in both public and private sector work. This can exacerbate issues for small businesses related to access to capital.

A few business owners and managers said that their assurance of payment, and of timely payment, was better for public sector contracts than private sector work. Examples comments include the following:

- A white male manager of a majority-owned engineering firm remarked that they like to work with the public sector because those customers pay their bills; whereas, private sector customers sometimes use the firm "as a bank." [#8]

- A white male owner of a majority-owned construction firm noted that state and county agencies usually pay on time. He added that some larger corporations take up to 120 days. [#13]

- A female representative of a majority-owned construction company replied that in the public sector, payments are typically faster. However, with a prime involved, that payment is slower since the prime first secures payment from the DOT and then the firm, as a sub, is paid. [#20]

Some interviewees said that slow payment is an issue in the private sector. Examples include the following:

- The white female owner of a DBE-certified consulting firm reported that she has clients that wait 90 to 120 days before paying the firm, which is challenging when she pays upfront expenses including staff payroll, housing and other incidentals. [#29]

- A white female owner of a DBE-certified specialty contracting business added that they have more issues with commercial jobs in terms of being paid. [#32]

- The white female owner of a DBE-certified specialty contracting business reported that they were shocked with the delay in payments as they began commercial work. [#27]

Several interviewees said that slow payment by the prime contractor is an issue and can be damaging to companies in the transportation contracting industry. Interviewees reported that payment issues might have a greater effect on small or poorly capitalized businesses. Comments include the following:

- The white female owner of a DBE-certified specialty contracting business added having difficulties with payments by some primes. She added that most contracts include 45-day payment clauses; she once waited 13 months for a retainage payment from a prime. [#1]

- A white female owner of a DBE-certified construction firm reported that they have not had a problem with slow payment as a prime, but as a subcontractor they do. [#30]

- The white female owner of a consulting firm remarked, "It's an issue … cash flow is always an issue for small business." [#21]

A few firms noted that they expect slow payment and plan for it. For example:

- The white female owner of a DBE-certified consulting firm said, "We know what to expect." She added that when they operate as a sub, they do not receive payment until the prime is paid and when they work as a prime, there is usually a 45-day clause in their contract regarding payment. [#33]

- A white male representative of a woman-owned engineering firm commented that payment is always a little slow with the government, but a firm already knows that when they bid public sector work. [#28]

- A white female owner a DBE-certified engineering and consulting firm commented that her firm takes into consideration that payment will be slower from public agencies. She went on to note, however, that public agencies always pay, even if it is frequently untimely. [#38]

Other topics. A number of interviewees reported additional keys to business success.

Some reported that an up-to-date and diverse skill set is important to their success. Comments include:

- A white female owner of a DBE-certified engineering and consulting firm reported that the main key to their business success was their level of education and qualifications. The DBE program helped them to continue to stay up to date. [#34]

- The white female owner of a DBE-certified consulting firm reported that keeping current on trends in the industry is a key factor to her success. [#25]

- When asked about any additional keys to business success, a white male owner of a majority-owned specialty contracting firm indicated that being able and willing to adapt to market conditions is very important, and that diversification is a key to success as well. [#41]

- The white female owner of a DBE-certified design firm reported that her firm's skill sets are very diverse and a key to their success. [#26]

- A white male representative of a majority-owned engineering firm reported that their strategy is to be a "one-stop shop" that is geographically diversified and multi-service. This diversity is helpful for clients. [#11]

Several reported that owners serve a critical role in the success of a firm. For instance:

- A white male representative of a DBE-certified, women-owned specialty contractor stated that high level of involvement by the owners is critical to business success. [#2]
- A female representative of a majority-owned heavy construction business reported that the owner is a large contributor to the company's success; the company maintains a family-owned dynamic that encourages staff. [#15]
- A white female owner of a DBE-certified construction firm reported one of the keys to their success is that they are family-owned. [#30]

G. Experience Doing Business with Public Agencies

In addition to barriers such as access to capital, bonding and insurance that may limit firms' ability to work with public agencies such as MDT, interviewees discussed other issues related to working for public agencies. (Some appeared to be barriers and some were not.) Topics included:

- Doing business with public agencies in general;
- Working specifically with MDT;
- Learning about prime contracting opportunities;
- Learning about subcontracting opportunities;
- Opportunities to market the firm;
- Prequalification requirements;
- Size of contracts;
- Prevailing wage requirements;
- Unnecessarily restrictive contract specifications;
- Bid process;
- Untimely payments; and
- Experience with MDT regarding any barriers and recommendations for improving processes.

Doing business with public agencies in general. The study team asked business owners and representatives about their experiences working with public agencies in general.

Some businesses reported positive experiences working with public agencies, including MDT. Comments included:

- A white male representative of a DBE-certified woman-owned contractor stated that it is a good experience working with public agencies because there is usually only one person overseeing the job. [#31]
- A white female owner of a DBE-certified construction firm commented that she enjoys working with public entities, in general. [#30]
- The white female owner of a DBE-certified design firm stated that, because of the firm's strategic planning, public facilitation and problem solving skills, the firm works well with public agencies. [#26]
- A white male owner of a SDVOSB-certified engineering firm reported that generally working for public agencies is good. [#9]
- The white male owner of a DBE-certified specialty contracting business reported that he especially enjoyed working with Fish and Game. [#17]
- A white male manager of a majority-owned engineering firm reported that the firm has a good relationship with the Missoula County and has done projects for them. He added there are clear expectations that he appreciates. [#8]
- A white male representative of a woman-owned specialty contracting firm reported that working with public agencies and MDT "goes smoother" than working in the private sector. [#23]
- The white female owner of a DBE-certified consulting firm stated that MDT is an important client and she has had no problems with MDT. [#29]
- The white female owner of a DBE-certified specialty contracting business noted that MDT usually works well with her firm. [#3]

Others were more ambivalent in their response, reporting just a normal working relationship. For example:

- The Native American female owner of a DBE-certified consulting firm reported that she had a difficult time getting into public sector, but once she did, she did not have any problems working. [#18]
- A white female owner of a DBE-certified specialty contracting business responded that it is a straightforward business relationship working with public agencies and they have not had any issues. She added that payment is timely. [#32]

- The white female owner of a DBE-certified consulting firm reported that with public agencies "it's been fairly easy." [#33]

- A female representative of a majority-owned construction company indicated that they have not had any issues working with public agencies and they get along with the ones they do work with. [#20]

- The white female owner of a specialty contracting business commented that she has not had any issues working with public agencies. She added that if she had any issues she would ask questions and find ways to solve problems. [#36]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported no negative experiences with MDT and commented that working with MDT is "fine." [#22]

Some businesses, however, reported difficulties when working in the public sector. For instance:

- The Native American female owner of a DBE-certified consulting firm responded that in the past she found that "it is not easy to get into the public sector work, period." She added, "… if you're brand new, it's almost next to impossible, it appears." [#18]

- A respondent from a majority-owned engineering firm reported' "With government work, if you're not an older company, it's very hard to break in [to secure work]." [#AI295]

- A white female owner a DBE-certified engineering and consulting firm reported that her firm did not get a job because the agency did not want to teach them "the ropes," even though her firm had the necessary qualifications. [#38]

- The Native American female owner of a DBE-certified supplier recalled an experience regarding working with Native American-owned businesses where she went to an agency meeting requesting support. She stated that she was there for about ten minutes before knowing that she was not going to get any help; she added that she could pick out the person who was going to get all of the support. "And of course it's corrupt, it's horribly corrupt," She added. [#19]

- The white female owner of a DBE-certified specialty contracting firm reported that working in the public sector is challenging due to the amount of time-consuming paperwork. She remarked that she must complete certified payrolls, track employee hours for concurrent jobs, as well as, work in the field. [#4]

- A male representative of a majority-owned transportation-related firm noted that there are not many minorities pursuing opportunities in Montana's public sector. [#16]

- A white female owner a DBE-certified engineering and consulting firm indicated that there are more rules and regulations when working with public agencies. She went on to say that when it comes to construction work, there are more bonding and insurance requirements; in the private sector, they only need to use professional liability insurance. [#38]

- A white male owner of a SDVOSB-certified engineering firm reported that on occasion a public agency wants more than what they want to pay for; He indicated that he makes his terms clear. [#9]

- A white male owner of a majority-owned construction firm reported they get many publications but "they're always changing the rules … the highway department changes rules …." [#13]

- When asked about experiences working for public agencies, the white female owner of a DBE-certified consulting firm commented, "It depends on the individual [agency] … they used to be awful … they used to be horrible payers … they micro-managed …." She added that today, public agencies still tend to act as they did before regarding contract specifications. For example, they add items after the signing the contract. [#29]

- The white female owner of a DBE-certified consulting firm reported that public agencies are problematic concerning dissemination of basic information and communication; for example, she remarked that there is a big difference between a "square meter" and a "meter squared." [#29]

Working specifically with MDT. The study team asked firms how working specifically with MDT is similar or different from working with other public agencies.

Some reported difficulties with inconsistent MDT staffing and policies. For instance:

- A white male representative of a DBE-certified, women-owned specialty contractor identified challenges stemming from MDT point-of-contact inconsistencies (i.e. inspectors, project managers), including MDT employees with multiple responsibilities. He said, "Maybe we don't have the same person on the job …. We'll do three jobs in a week, and have three different inspectors." [#2]

- In contrast to other public agencies, a white male manager of a majority-owned engineering firm commented that with MDT the consultants do not know with whom they are working on a project; plans go through 30 or 40 different MDT staff. He added that while construction is happening, MDT attempts to change previously approved plans. [#8]

- A female representative of a majority-owned heavy construction business replied that she has not managed an MDT job but she has heard that there are "… a lot of hands in the pot …." She added that there are too many people involved; there is not a consistent set of people responsible for the project. [#15]

- The Native American female owner of a DBE-certified contracting business commented that MDT is difficult to work with at times. She stated, "Sometimes I get the feeling that there's no consistency across the board with some of the state … some of them will let you do it this way and some of them will let you do it that way, and some of them don't care …. Not all project managers are created equal …." [#35]

- The Native American female owner of a DBE-certified consulting firm explained that it took almost 20 years for her to get a contract from MDT. She mentioned that it was very difficult up until MDT hired a female manager/supervisor. Only then did she have the opportunity to start work because MDT had no other choice but to hire the interviewee's company as well as another male-owned company for one job. She commented, "That's fine with me, the proof is in the pudding." [#18]

Several Interviewees reported challenges related to particularly strict MDT specifications and protocols. For instance:

- A white male representative of a trade organization reported that MDT tends to give very short notice on available project opportunities. He went on to say that they are also very "rigid" when it comes to adhering to project specifications and protocols. [#TO2]

- A white male representative of a trade organization commented that MDT's specifications are "tighter" than other public agencies' while being equally as demanding. He added that for this reason, small companies might have a more difficult time working as a general contractor for MDT. [#TO1]

- When asked about his firm's experience working directly with MDT, a white male representative of a majority-owned engineering firm reported that MDT has very "strict and rigid" protocols and provides very short notice when jobs become available. [#39]

- A white female owner of a DBE-certified engineering and consulting firm stated that MDT is not an "A" client. They expect you to guess what they want and yell at you for asking questions. They want things done a certain way and are not happy with the way the consultants do it. [#34]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that MDT has good staff in Montana, but "their hands are tied." He added that working with MDT in the Billings area is challenging. The female owner of the business reported having knowledge of other firms commenting that the Billings MDT district is the hardest to work with in Montana. [#27]

A few reported specific communication challenges when working with MDT, particularly when protocols change. Comments include:

- The Native American female owner of a DBE-certified consulting firm stated, "I find that it's not easy, but I can do the job for MDT." She commented that sometimes it could be hard if you do not exactly understand what is required, and the communication is lacking (unintentionally). "It's just the way things worked." [#18]

- A white male representative of a majority-owned engineering firm reported that he is aware that MDT is going through changes with their consultant selection process. His firm is trying to learn about the process and its future impacts. He commented that in the past the firm would get a call from MDT asking if they were interested in working on a project. He added that it is difficult to know how things will change going forward since they will be developing a more formal RFP consultant selection process. The interviewee further added that he does not know if MDT will be changing the consultant selection process to be more in line with other public agencies. He added that with the informal method of consultant selection, it was easy because it took little time to prepare for proposals; however, without an RFP, the interviewee said, "You don't really know what you don't know." [#11]

- A white male owner of a SDVOSB-certified engineering firm further remarked that a negative factor is that MDT worked in the metric system and now plans to go out of metric. [#9]

However, some businesses reported that working with MDT was similar to, or better than, working with other public agencies. For example:

- A female representative of a majority-owned construction company commented that the experience is about the same working with MDT. [#20]

- A white male owner of a majority-owned construction firm indicated that working with MDT was very similar to working with other public agencies. He said, "It's pretty much the same." [#13]

- A Native American male owner of a DBE-certified consulting firm commented that working with MDT is similar to working with other non-federal agencies. He remarked that with the federal agencies, there is a higher standard of report writing required and data gathering. [#6]

- When asked if her experience with public agencies applied to working with MDT, the white female owner of a specialty contracting business responded that it was the same. She commented, "Most of the people at MDT are just wonderful." [#36]

- The white male owner of a consulting firm reported that that he really enjoys working with MDT, "… probably better than any of the other agencies in Montana. They are well run, there is a lot of accountability within the department, they understand contracting very well, budgeting very well, scopes of work and they don't ask us to do work that is not in the contract." [#14]

- A white male representative of a majority-owned specialty contracting business remarked that he could not report any bad experiences with MDT; working with them on negotiations and problem solving is easy. He added that the firm has good relationships with MDT project managers and crew. [#5]

- The white male owner of a consulting firm noted that some agencies ask the firm to do work that is not in the contract; and, that those agencies seem to be "anti-consulting" (i.e., they do not like working with consultants but they have to). He also mentioned that he appreciated that MDT is also very quick in turning around their invoices (2 to 3 week turnarounds). [#14]

- Contrasting with difficulties she has had with other public agencies, the white female owner of a DBE-certified consulting firm said, "I have loved working with MDT … you don't make much profit … the people … in the Cultural Resource Department give really long deadlines … that means I can use them as fillers on projects … that's worth a lot of money …." She added that MDT staff are easy to talk with, are not micro-managers, are pragmatic and understand their jobs. [#29]

Learning about prime contracting opportunities. Some firms spoke about how they learn about opportunities as prime contractors.

Most reported relying on bidding websites, email lists and online tools to learn about opportunities. For instance:

- To learn about prime opportunities, a white male representative of a DBE-certified, women-owned specialty contractor reported firm membership in three different building exchanges: Billings Builders Exchange, Helena Plans Exchange and iSqFt. He also reported that the firm receives direct solicitations to bid. He also reported receiving many email solicitations to bid; he said, "So far this year [September], I have 1,602." [#2]

- The Native American male owner of a DBE-certified specialty contracting company remarked that they belong to Plans Exchange and "keep their eyes and ears open." He added that they get MDT solicitations on the smaller highway projects. [#7]

- The white female owner of a DBE-certified specialty contracting business reported that effective ways for finding bidding opportunities include MDT's or North Dakota's website. In addition, she commented that she receives email notices from the Helena DBE program of potential opportunities. [#3]

- A Native American male owner of a DBE-certified consulting firm reported that the firm receives emails from the DBE Program. [#6]

- A white male manager of a majority-owned engineering firm reported that MDT opportunities are available via email solicitations, their website and required public advertisements in legal papers. [#8]

- The white male owner of a DBE-certified specialty contracting business responded that they learn about opportunities through the DBE Program. They usually get an email sent to them: it is a list of all the DBEs and opportunities to look at the projects. When it comes to Fish and Game, they will contact the company directly. [#17]

- When asked about learning of prime contract opportunities, a female representative of a majority-owned construction company responded that the estimators they have notify the firm of any suitable projects via the DOT website. [#20]

- The white female owner of a DBE-certified consulting firm commented that prime contract opportunities come through an RFP for an IDIQ (indefinite delivery, indefinite quantity). [#29]

- A white female owner of a DBE-certified construction firm indicated that they get most of their information for bidding through the Builders Exchange and they receive newsletters via email. [#30]

- A white male representative of a DBE-certified woman-owned contractor responded that he learns about opportunities through the Builders Exchange, the Forest Service and the DOT website. [#31]

- The white female owner of a DBE-certified consulting firm mentioned that they rely "heavily" on "FedBizOpps" and "FedConnect" for notifications on job postings. [#33]

- The Native American female owner of a DBE-certified contracting business indicated that there is no problem finding and learning out about contracts. She commented, "… that's all pretty much out there," and added that they use the MDT website as well as the Builders Exchange to look for jobs. [#35]

- When asked how membership learns about prime contracting opportunities, a white male representative of a trade organization stated that the highway department posts jobs online, and that there are "plan exchanges." He also noted that there is a bidders list of general contractors available. [#TO1]

Some reported learning about opportunities through hardcopy notices like mailers or newspapers. Examples include:

- A white male owner of a SDVOSB-certified engineering firm reported receiving mailers from public agencies; his firm sends back Letters of Interest completing any state forms that are required. [#9]

  In addition, the same interviewee commented that public agencies periodically send out questionnaires to determine if contractors are interested in continuing to receive solicitations from the agency. [#9]

- A DBE-certified, women-owned specialty contractor reported commented that MDT sends out postal mail. [#2]

- A white female owner a DBE-certified engineering and consulting firm noted that they use city websites and newspapers to learn about opportunities. [#38]

- A white male representative of a woman-owned engineering firm reported that he usually hears of opportunities through the newspaper. [#28]

Some reported hearing of opportunities from clients or others in the industry. For instance:

- When asked about contracting opportunities, a white male owner of a majority-owned construction firm reported direct contact for public work. [#13]

- When asked about how they find out about work, the white male owner of a consulting firm responded that many know of the firm because they have been around for a while. He reported that the firm marketed to get its name out. They also are on bid lists, and there are many word-of-mouth referrals from clients. [#14]

- The white female owner of a consulting firm reported that she learns about opportunities through word-of-mouth information. She added that early in her career she looked for RFPs and solicitations, so she is familiar with the process. [#21]

- A white male representative of a woman-owned specialty contracting firm reported that general contractors and MDT notify them of opportunities. Additionally, the firm checks the internet. [#23]

- The white female owner of a DBE-certified consulting firm indicated that clients might alert her to opportunities. She also knows the correct websites to review. [#25]

Several firms highlighted difficulties learning about prime opportunities. Comments included:

- A Native American male representative of a majority-owned specialty contractor reported that in the public sector, particularly in cities like Whitefish or Culbertson, advertising of opportunities is limited. He added that estimators do not announce that work is up and coming; in some cases, they only publish it in the "legals" in the newspaper. [#5]

  He added that work should be on the "Exchange" and advertised to contractors. He also commented that the State (MDT) has boilerplate information on their website and needs to do a better job of announcing prospective projects. [#5]

- The Native American female owner of a DBE-certified supplier reported that she does not find out about jobs and does not know how other businesses find out about them either. "I think people come to them and ask to bid them." [#19]

Learning about subcontracting opportunities. Some interviewees noted that they find out about subcontracting opportunities the same way they learn about prime opportunities.

Some business owners and representatives equated learning about subcontracting opportunities with learning about prime opportunities. [e.g., #25, #35] Comments from the in-depth interviews include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported using primarily the same resources as he does for priming to learn about subcontracting opportunities. He reported that for some jobs, prime contractors reach out to them directly. [#2]

- A female representative of a majority-owned construction company commented that their experiences learning about subcontracting opportunities are the same as learning about prime opportunities. [#20]

- A white female owner of a DBE-certified construction firm reported that the way they find out about subcontracting opportunities is the same as how they learn about prime opportunities. She added that they receive calls from the primes as well for subcontract work. [#30]

Some reported relying on bidding websites, lists and online tools to learn about subcontracting opportunities. For instance:

- The white female owner of a DBE-certified specialty contracting business reported that the firm relies on the Builders Exchange; the DBE Program in Montana sends notifications to her by email. [#1]

- A white female owner of a DBE-certified specialty contracting business signs on to Plans Exchange online where they can see which jobs are available for bidding; they also use the "FedBizOpps" website for all federal work. [#32]

- When asked how his firm learns about subcontract opportunities, a white male owner of a majority-owned specialty contracting firm reported that he uses the state project bid-letting website; if he feels a job is well-suited to his firm, he finds out which primes are bidding and contacts them. [#41]

- The white female owner of a specialty contracting business indicated that the state of Montana has their website and they send out invitations to bid, which is where she primarily looks for opportunities. She also mentioned that she would call contractors and find out which jobs they plan to bid. [#36]

  The same white female owner of a specialty contracting business added that for a lot of firms first getting into contracting work, it is hard to know where to get the planholders list and to find out which jobs are coming up to bid, unless they know specifically where to look. [#36]

- The white female owner of a DBE-certified specialty contracting business reported that they learn about subcontracting opportunities through DBE emails and Builders Exchange. [#27]

Several firms reported that email lists often sent them solicitations for jobs outside of their workscope. For instance:

- The white female owner of a DBE-certified specialty contracting firm reported that the DBE Program includes emails about upcoming projects. However, she remarked that some communications are for work outside of her scope. [#4]

- A white male representative of a majority-owned specialty contracting business receives many emails but generally, they are outside of their scope of work. [#5]

Some reported proactively calling potential primes to identify opportunities. For example:

- The white female owner of a DBE-certified consulting firm indicated that she reviews RFPs and calls primes; or primes reach out to her to subconsult. [#25]

- A white female owner of a DBE-certified engineering and consulting firm reported that they pick up the phone and call around to find out who is doing the contracts to stay top of mind for projects. [#34]

A number of owners and representatives reported learning about new opportunities from previous clients and other businesses with which they have relationships. Comments include:

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor stated that the firm learns of subcontracting jobs through advertisements and its relationships with primes. [#22]

- The white female owner of a DBE-certified consulting firm reported that usually engineering firms call her regarding subcontracting opportunities. The interviewee added that on occasion the firm receives calls because they are a DBE. She remarked that there are not many DBEs in her area and in her industry anymore. [#29]

- When asked how she finds work as a subcontractor, the white female owner of a DBE-certified specialty consulting firm reported that she mainly learns about work through referrals. She went on to say that her firm is also on the list of DBE providers. [#37]

- When asked how her firm learns about subcontracting opportunities, a white female owner a DBE-certified engineering and consulting firm reported that they receive solicitations from primes, and that their relationship with the Builders Exchange brings them opportunities as well. [#38]

- A white female owner of a DBE-certified specialty contracting company reported that her firm usually receives emails from clients regarding subcontracting opportunities. [#40]

- The white female owner of a DBE-certified consulting firm indicated they depend on two of their clients to scout for jobs since they have access to GSA, whereas her firm does not. She added that one client in particular sends the interviewee postings on opportunities that might pertain to the firm's services. [#33]

Opportunities to market the firm. Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves.

Some more established firms reported marketing is not necessary. [e.g., #37, #38, #40, #41] For instance:

- A white male representative of a DBE-certified, women-owned specialty contractor reported previously marketing the firm to all the counties in Montana and Northern Wyoming. Now established in the industry, this no longer is necessary; he said, "They know who we are now." [#2]

- The white female owner of an established DBE-certified specialty contracting business said her firm does "very little." She added, "Reputation is the best …." [#27]

- The Native American female owner of a DBE-certified contracting business responded that the majority of their work is in the public sector, most of the state knows who the current operating contractors are. She added that marketing plays a minor role for her firm. [#35]

A number of other firms reported doing little or no marketing. Comments included:

- The white female owner of a DBE-certified consulting firm said that during slow periods they have done "experimental" with no results. [#29]

- When asked about marketing opportunities, The Native American male owner of a DBE-certified specialty contracting company said, "We really don't [market the firm]." [#7]

- A white male representative of a woman-owned specialty contracting firm stated that the firm does not do much marketing. [#23]

- A white female owner of a DBE-certified construction firm mentioned that they do not typically market the firm. [#30]

- A white male owner of a majority-owned construction firm reported that they do "very little" marketing. [#13]

- A white male owner of a SDVOSB-certified engineering firm reported that they do not do much marketing other than publishing in the "phone book" and on the website. [#9]

- A female representative of a majority-owned construction company reported that they do not typically market the firm, and added that with the public sector, they bid on the work and usually the lowest bidder gets the project. [#20]

- A white male owner of a SDVOSB-certified engineering firm added that professional code has changed for attorneys allowing them to advertise on TV and other sources, but he does not believe the code has changed for engineers. [#9]

Several interviewees discussed marketing to public agencies, including MDT. For example:

- A white male representative of a woman-owned engineering firm remarked that his firm would like to market to public agencies. [#28]

- The white male owner of a consulting firm said that they have a website and send out a quarterly newsletter, attend conferences and make cold calls at times. [#14]

- A Native American male owner of a DBE-certified consulting firm indicated that at start-up, the firm sent fliers to all public agencies and targeted firms. It plans to revisit advertising as the firm now has a designated advertising budget. He remarked that the firm's website phone line identifies the calls coming in from the site. He noted, however, that public agencies do not ever provide an opportunity for marketing. [#6]

- A white male representative of a majority-owned engineering firm reported that some public sector clients are nearby that have project opportunities every few years; therefore, the firm attends council meetings, conferences and regularly talks to public officials and public works directors. However, he commented that the firm struggles with a marketing strategy to reach out to MDT. [#11]

- The white female owner of a consulting firm reported that she has begun to market her firm more diligently to a broader audience due to the difficulties of the community. She added she would like to reach out to public agencies in order to "diversify our base." [#21]

- The white female owner of a DBE-certified design firm indicated that she recently added a part-time marketing staff member to address marketing issues and raise the status of the firm. She added that large firms obtain work based on the firm's reputation; as a "micro-business" and/or a woman-owned firm, she must "be out there" positioning herself as an expert in the field. To be noticed she must work hard. [#26]

- The white female owner of a DBE-certified consulting firm commented that they do informal marketing "through creating … a higher profile by attendance at meetings …." [#33]

- When asked how her firm markets itself, a white female owner of a DBE-certified engineering and consulting firm indicated the firm had a website with the help of the DBE Program, and sometimes they did mailings, but mostly it was word-of-mouth advertising. [#34]

- The white male owner of a DBE-certified specialty contracting business reported that the DBE Program helped to fund their website, which has helped them a great deal. He has also had opportunities to meet with contracting officers and other prime contractors face to face. [#17]

- A white male manager of a majority-owned engineering firm reported that to market the firm to MDT, a firm calls and makes appointments to talk with them. [#8]

- When asked about opportunities to market directly to MDT, a white male representative of a trade organization reported that members often make "cold calls" or attend MDT meetings to introduce themselves. [#TO2]

A few said marketing in public sector is restrictive or unnecessary. For example:

- The white female owner of a DBE-certified consulting firm remarked that opportunities to market the firm are limited due to the constraints that exist in the public sector; for example, not taking clients out for coffee (as she does in the private sector). [#25]

- When asked if she has had opportunities to market directly to MDT, the white female owner of a DBE-certified specialty contracting firm replied that she has not and wants to find out to whom she should reach out. She added that she has never had contact with anyone at MDT other than DBE staff. [#4]

- A white male representative of a majority-owned specialty contracting business reported doing a fair amount of marketing, but not as much as they did during the economic downturn. He added that there is not much of a necessity to market to cities or MDT. He explained that awards stem not from marketing or relationships; awards result from low bid. [#5]

Prequalification requirements. Public agencies, including MDT, sometimes use prequalification processes in their consultant selection. MDT does not typically require prequalification for construction contracts. For example:

Several firms reported difficulties associated with prequalification. Comments included:

- The white female owner of a DBE-certified consulting firm stated that it has not been easy to get work with MDT. When she applied two years ago, she was not able to get on the "pre-qual" list; did not have the time or the staff to "make the cut." [#33]

- In reference to the prequalification process, a white male manager of a majority-owned engineering firm reported that because of certain barriers the firm is in the bottom third of the prequalified list (for example, MDT RFP's require previous MDT work experience). As proof, he added that the firms getting MDT work are repeatedly the same five firms on the top of the MDT prequalified list. [#8]

  He went on to say that some public agencies unfairly require firms to submit their billing rates and cost proposals along with their prequalification documentation. [#8]

- A white male representative of a majority-owned engineering firm commented that the prequalification "roster system" has always been a conundrum because of the time the firm spends on responding to prequalification requirements. He added, "… [prequalification has] always been some kind of a strange system." [#11]

  The same representative reported submitting firm qualifications repeatedly for over a decade, but never making the MDT roster of prequalified firms. He indicated that the firm must decide if "they [should] keep barking up that tree …." He inquired, "… are they [MDT] trying to send us a message?" [#11]

- A respondent from a majority-owned consulting firm indicated having prequalified for many years, but never receiving any work from MDT. [#I328]

Some specialty contracting firms reported administrative barriers to prequalification. For example, comments ranged from paperwork issues to level of experience to invasive requirements:

- A white male representative of a DBE-certified, women-owned specialty contractor remarked that the requirements for prequalification are time consuming. [#2]

- The white female owner of a DBE-certified specialty contracting business reported that prequalification is always a challenge, especially because of the amount of experience required to qualify. [#27]

Some reported no difficulty with prequalification, or had no need to prequalify. [e.g., #36, #40, #TO1] For example:

- A female representative of a majority-owned heavy construction business commented that they have not had any problems with prequalification requirements. [#15]

- A white male owner of a majority-owned specialty contracting firm reported that his firm has never encountered issues with prequalification requirements. [#41]

- The white female owner of a DBE-certified specialty consulting firm reported that she has not had issues with prequalification because it has not yet been required for the type of work her firm performs. [#37]

Size of contracts. Several firms commented that the size of a contract might prevent smaller firms from bidding on it — bigger contracts may require too many resources while smaller contracts may require too much overhead for small businesses to remain competitive. Comments included:

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that size of contracts is an issue for smaller firms since they can only bid on certain smaller size jobs, not large projects. He added that the size limitation is from both resources and bonding capacity of the firm. [#22]

- A Native American male owner of a DBE-certified consulting firm noted that designation as a small firm can be limiting in the size of contracts they can bid. [#6]

- A female representative of a majority-owned construction company indicated that some contracts may be too big, but generally, if the project looks to be too big they do not bid the work. [#20]

- The white female owner of a DBE-certified specialty consulting firm reported that her firm has had to team up with other firms in order to complete larger contracts. [#37]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that the sizes of most public sector projects are too large for the firm. [#27]

- The white female owner of a DBE-certified consulting firm replied that they might have trouble acquiring a larger contract given the size of the firm. She added that the largest contract they had was about $60,000. [#33]

- A white female owner of a DBE-certified construction firm reported that many of the projects are for bigger companies because of the amount of work that is required to complete it. Subsequently, this prevents firm from bidding those projects. [#30]

  She added because small firms can only bid on smaller projects, it is frustrating when a large company bids low on a smaller project. [#30]

- The white female owner of a DBE-certified consulting firm commented that there are small or big contracts, but both can be challenging for her. She added that there are not many small-medium size contracts in the public sector. [#25]

- The Native American male owner of a DBE-certified specialty contracting company stated, "Overall [MDT does] a nice job." He added that he wished, "[MDT put] out more work … our size." [#7]

Prevailing wage requirements. Many interviewees reported never having to deal with prevailing wage requirements or unions. [e.g., #4, #11, #14, #19, #23, #28, #29, #32, #35, #41]

Of those that do deal with prevailing wage requirements, most reported having no issues. Some reported honoring prevailing wages even though they are not union contractors. For example:

- A white male representative of a majority-owned specialty contracting business reported that the firm is a union company and most projects are prevailing wage. [#5]

- The white female owner of a specialty contracting business commented that she has always been a union contractor. [#36]

- A white male owner of a majority-owned construction firm responded that they are union, meaning that they pay for insurance, medical insurance and retirement which is done for public and private contracts. [#13]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the firm is non-union, but otherwise, there are no issues meeting prevailing wages. [#22]

- The white female owner of a DBE-certified specialty contracting business reported that they pay the prevailing wage on many jobs, but have not had need to hire union workers. [#27]

- A female representative of a majority-owned construction company responded that they do prevailing wage; they do not do anything with the union. [#20]

- A female representative of a majority-owned heavy construction business reported that they are nonunion but they will do prevailing wage with no issues. [#15]

- The white male owner of a DBE-certified specialty contracting business reported that they do pay prevailing wage and fringe benefits depending on the contract. [#17]

- A white male representative of a DBE-certified, women-owned specialty contractor reported the firm pays Davis-Bacon wages (prevailing wage) on both private and public sector work. He noted that although not required for private work, the firm still chooses to pay Davis-Bacon wages. [#2]

- The Native American male owner of a DBE-certified specialty contracting company reported that the firm is not union, but honors prevailing wages as necessary and provides certified payrolls as required. [#7]

Some firms reported challenges resulting from prevailing wage requirements. For example:

- A white female owner of a DBE-certified construction firm stated that the only bad thing about working with a public agency is that there is prevailing wage, certified payroll and CGR123s; there is more paperwork involved as opposed that a private entity. [#30]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that a challenge for small business is that "it's harder to set up some of the trusts and things like that … [for] employees … for the fringe benefit part of the payroll." [#2]

- The white female owner of a DBE-certified specialty contracting business reported that the firm must pay prevailing wages. Prevailing wage requirements are good for her workers, but challenging for her when lump sum bidding. Furthermore, when asked if paperwork involved with prevailing wages is challenging, she responded that she could not attend the DBE workshops so she learned it on her own using QuickBooks. [#3]

- A white male representative of a DBE-certified, woman-owned construction firm reported that the firm is not a union shop; the firm has lost work as a result. [#10]

Unnecessarily restrictive contract specifications. The study team asked business owners and representatives if contract specifications, particularly on public sector contracts (and MDT), restrict opportunities to obtaining work.

Many owners and managers indicated that workscope, contract language, bonding and insurance specifications are overly restrictive and present barriers. Examples include:

- The white female owner of a DBE-certified consulting firm commented that not having well-defined scopes is challenging. [#25]

- The Native American male owner of a DBE-certified specialty contracting company reported unnecessarily restrictive contract specifications with municipalities at times. He added that explaining the specifications and contract language helps his firm adapt. [#7]

- The white female owner of a DBE-certified specialty contracting firm reported that the firm wanted to bid on municipality projects. It could not because of restrictive bonding requirements. She explained that the firm did not have time to secure bonding before the bids were due. [#4]

- A white male representative of a majority-owned engineering firm commented that public agencies go after consultants for liability and errors and omissions issues. He explained that those incidences have dropped, but the firm takes extra caution to protect its professional liability exposure. He further added that public agencies put language in contracts that put consultants in difficult situations. [#11]

- When asked about any other unnecessarily restrictive contract specifications, a white female owner a DBE-certified engineering and consulting firm reported that smaller businesses are likely to encounter issues with high insurance coverage requirements, especially when it comes to umbrella insurance. [#38]

- A white male representative of a trade organization reiterated that MDT has "tighter" specifications than other public agencies, and that this can make it difficult for smaller firms to work as general contractors for them. [#TO1]

- A white male representative of a DBE-certified, woman-owned construction firm reported that working with MDT's specifications is very difficult. [#10]

- A respondent from a majority-owned consulting firm indicated that complying with certain regulations is "challenging and costly for a small firm … [particularly challenging when] gross revenue from MDT projects is relatively low [compared] to the cost of … compliance." [#AI435]

- The white male owner of a consulting firm stated that there are some barriers such as expenses associated with doing work and complying with regulations (e.g., with MDT regulations concerning accounting practices). A barrier such as this changes how the company approaches accounting. They have periodic audits to justify their overhead rate, which again, is expensive for a small business (about $5,000 to $6,000 per year). [#14]

Several interviewees reported difficulty with prior experience requirements. For example:

- The white female owner of a DBE-certified specialty contracting business commented that occasionally contract specifications require ten years of experience. [#1]

- A Native American male representative of a majority-owned specialty contractor commented that years ago the firm had an experience where it did not have enough industry experience to satisfy the contract specifications so it did not qualify for the project. [#5]

- A white male manager of a majority-owned engineering firm noted that specifications dictating years of experience and size of prior contracts are also unnecessarily restrictive. He stated, "… it's a monster … it's a monster." [#8]

- The white male owner of a consulting firm described that some firms require previous experience on a particular site, which suggests they hire only those firms with prior experience.[#14]

- A white male representative of a woman-owned engineering firm reported a current proposal clause, "Twenty percent of the value of your proposal was based on your current work with the entity." He explained, therefore, if a firm has not worked before with the entity, the highest score achievable is 80 percent. He further added that that is how public agencies write their RFPs to guarantee that they can hire the same firms each time. [#28]

A few business owners reported on industry-specific specifications. Comments include:

- The white female owner of a DBE-certified design firm reported that MDT has gone to a design-build format for certain venues. She added that for her firm to have opportunity to subconsult on those projects it must be on multiple teams; however, MDT requires that the firm be on only one team. [#26]

- When asked about any unnecessary restrictions, the white male owner of a consulting firm reported that there is a specific type of industry training performed by a single individual. This individual's method has proved to be quite successful, and as a result, some agencies require this type of training. However, he explained that this requirement is not always necessary or in the best interest of the company. [#14]

- A white male representative of a DBE-certified, women-owned specialty contractor said, "There are jobs we just don't bid because … it looks like it's too difficult, there's too many restrictions …. It's not that we couldn't do it, it's just that there's good work out there …. Why bother with a horrible job, when you can … do a good one …." He gave examples of different types of restrictions that would discourage the firm from bidding, such as "time restraints … they don't allow enough time to do the job … some have to be done at night … things like that …. With the restricted hours you can work, if you work a night job, basically you can't work the day before or the day after." He reported his firm submitting higher bids when there are such requirements. [#2]

A few engineering businesses specifically reported that requiring MicroStation software posed a barrier to pursuing MDT jobs. For instance:

- A white male manager of a majority-owned engineering firm commented that the MicroStation software required by some RFPs ties the hands of firms to hire a very specific type of software engineer (most other agencies use a more standard software, AutoCAD). He further clarified that the required software is specific to highway transportation engineering and no other public agency uses the software. [#8]

- A white male representative of a woman-owned engineering firm commented that they have investigated working with MDT, but they do not use MicroStation. He added that the only agency using MicroStation is MDT; it is expensive software and requires specialized training. He remarked that if a firm purchases MicroStation, they must solely go after MDT work because of the huge expense of the software. He added that small jobs do not justify buying MicroStation. [#28]

Bid process. A number of business owners and representatives found the bid process to be challenging.

Some firms reported that understanding the process, scope, requirements and pricing is a challenge. Examples include:

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that online bidding is challenging, you have to know the requirements. [#27]

- A female representative of a majority-owned heavy construction business indicated that although bidding is standard they have had trouble with bidding registration. [#15]

- The white female owner of a DBE-certified specialty contracting business reported that bidding processes are different for all projects, so just knowing what is required is "key." She added that she would like MDT's bidding information and specifications to be more easily accessible. She commented that she has notified MDT of her difficulties and no one has been helpful to her. [#1]

- A white male representative of a majority-owned specialty contracting business reported that MDT has a question and answer form where firms can ask questions before bidding; however, he added that sometimes the answers are non-existent, untimely, vague or irrelevant. [#5]

- The white female owner of a DBE-certified consulting firm reported that the bidding process is a big challenge for her. She reported the amount of work involved in bidding and her lack of understanding of the scope often affects the quality of her quote. [#25]

- The Native American female owner of a DBE-certified consulting firm reported that she is not very good at bidding. She has difficulty knowing "what they want and how they want it." Although she is trying to learn more by attending classes she stated, "It really still leaves you in the dark." She reported limited benefit as information is lacking about how and where to present the "dollar figures." [#18]

- A Native American male owner of a DBE-certified consulting firm noted that pricing is a challenge for the firm. [#6]

Some commented on time and timing challenges concerning bidding. Comments include:

- When asked why he has not done much MDT work, a white male owner of a SDVOSB-certified engineering firm responded that MDT projects require "a lot of paperwork" and "little product." He noted that he could have secured work with MDT in the past but chose not to propose again. [#9]

- The white female owner of a DBE-certified specialty contracting business remarked that some public agencies do not provide enough time for contractors to prepare and submit bids. She added that insufficient time to bid is demanding for small businesses. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported challenges with the bidding process dissipating over time, because the business has been bidding for over twenty years. However, he said, "[The process is] very time consuming." [#2]

- A white male representative of a majority-owned specialty contracting business reported challenges when multiple MDT jobs are available at the same time or in the summer months (their busy time), and they want to bid on all of them. For example, he added that there are two jobs simultaneously available now, but 15 coming up in a single month (which he reported as a barrier to bidding). He advised MDT to spread bidding opportunities over many months. [#5]

A number of others reported other issues with the bid process, including unfairness and rules bending for some. For example:

- A white male manager of a majority-owned engineering firm commented that as a prequalified engineering firm, they should have "a shot" at accessing opportunities. However, he said that the reaction from the public agencies is, "Why should [we] change who [we] have been working with for thirty years?" After looking at the process closely, he indicated that the process is "unfair." [#8]

- The Native American male owner of a DBE-certified specialty contracting company reported no barriers with MDT since he has not done much work; however, there are some "strange things" with the municipal bidding processes where they "bend the rules" their way at times. However, he added that MDT, tribal and federal bidding processes are more structured than local municipalities. [#7]

- The Native American female owner of a DBE-certified contracting business commented, "The bidding processes are 'flawed,' but that's just the way it's going to be." [#35]

A few interviewees reported positively about public agencies' and MDT's bid processes, or did not find them challenging. [e.g., #20, #23, #33] For example:

- The white female owner of a DBE-certified consulting firm commented that the bidding process is fair and works well. [#29]

- A white female owner of a DBE-certified construction firm replied that when it comes to bidding on public jobs there is a "level playing field." [#30]

- The white female owner of a DBE-certified specialty contracting firm commented that she asks for contract changes and gets them, if she finds specifications she cannot meet. [#4]

- When asked about MDT's bid process, a white female owner of a DBE-certified specialty contracting company commented that her firm has never had problems with it, commenting, "… it [works] well." She went on to say that the firm took advantage of assistance classes that explained how to meet primes and how to fill out bid forms. [#40]

- A white male representative of a trade organization reported that MDT's bid process, for the most part, is "transparent." He went on to say that he has not heard of members complaining about the process. [#TO1]

Untimely payments. Many businesses discussed whether untimely payment is a barrier to doing work with some public agencies or primes. [e.g., #6, #7, #11, #36]

Some reported that untimely payments from public agencies were a challenge on public sector contracts. [e.g., #TO1, #AI358] For example:

- The white male owner of a DBE-certified specialty contracting business reported that the challenge with government contracts is that they pay much slower than private sector work does. [#17]

- The Native American female owner of a DBE-certified consulting firm reported that in the past payment was better, but now it is very slow (about 60 days) with respect to MDT. [#18]

- A white male representative of a woman-owned specialty contracting firm commented, "[payment] seems to be dragging a little longer than it used too." [#23]

- The Native American female owner of a DBE-certified contracting business stated that Montana was lagging in timely payment. She added that it takes forever to receive payment from the State of Montana (about six to eight weeks) unless a firm is doing maintenance work, then payment only takes about two weeks. [#35]

Others reported that public agencies in general pay in a timely manner. [e.g., #25, #29, #37, #32, #40] For example:

- Both a white male representative and a Native American male representative of a majority-owned specialty contractor remarked that the public agencies pay well. [#5]

- The white female owner of a DBE-certified specialty contracting business commented that Montana agencies pay in a timely manner, even before 30 days. She added that federal agencies are not problematic as long as her paperwork is in order. [#1]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor called timely payments a "non-issue." [#22]

- A white male representative of a DBE-certified woman-owned contractor replied that they typically receive payment within 30 days by public agencies. [#31]

- A white male representative of a majority-owned engineering firm reported that in his firm's experience, payments from MDT tend to be very timely. [#39]

- When asked about timely payment, The Native American female owner of a DBE-certified supplier replied. "It's fine … kind of slow but they're fine." [#19]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that a long paperwork trail is required, but as long as the prime does his work, the public sector is usually good about payments. [#27]

- A white male owner of a SDVOSB-certified engineering firm reported that public agencies require pay requests; they usually pay three weeks later. He added that the firm plans for delayed payments from public agencies as part of doing business. [#9]

- A white male owner of a majority-owned specialty contracting firm reported that while timely payments from public agencies are timely for the most part, payments for federal projects tend to take the longest. [#41]

Some reported on untimely payments from prime contractors on public sector contracts. Some reported differences between prime and sub payments, and other barriers including:

- A white male representative of a DBE-certified, women-owned specialty contractor stated: "Working as a prime, the agencies pay very quickly." He reported that as a subcontractor, some public agencies have to have federal approval prior to payment, and this can create a delay. [#1]

- The white female owner of a DBE-certified design firm stated that as a prime, payment is not an issue. However, she added, as a subconsultant, payment is "ridiculous." She reported that she has received no payment in over six months by a local public agency. [#26]

  The same business owner added that some contracts for subconsultants include sections that state the firm does not receive payment until the prime is paid. One of the challenges is that when the prime is not a good bookkeeper and does not bill the agency in a timely fashion, it delays her firm's payments for months. She added that when she calls MDT about untimely subconsultant payment, staff responds that they have nothing to do with a subconsultant's problems with a prime's untimely payments. [#26]

- A white female owner of a DBE-certified engineering and consulting firm reported trouble with timely payment. The subs usually only get paid when the prime is paid and the lag time can be painful. Some primes will pay the subs before they are paid, but that is rare. [#34]

- A white male representative of a DBE-certified, women-owned specialty contractor reported, "The Montana Department of Transportation … at the end of every month, they … do a payment to the prime contractor. And, Montana actually has laws that … state that when the prime contractor gets paid, they have to pay the sub." He reported that about 90 percent of the primes comply with the law. [#2]

Experience with MDT regarding any barriers and recommendations for improving processes. In addition to factors common to contracting among public agencies in Montana, interviewees had a few additional comments specific to MDT processes. For example:

- A respondent from an Asian-Pacific American-owned engineering firm reported, "They [MDT] need a list like [FedBizOpps.Gov]." [#AI49]

- A white male representative of a majority-owned engineering firm reported that the firm has had difficulties with MDT design-build projects in the past and has stayed away from those ever since. [#11]

H. Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denial of opportunity to bid;
- Bid shopping and bid manipulation; and
- Unfair treatment and approval of work.

Denial of opportunity to bid. The interview team asked business owners and managers if they had ever been denied the opportunity to bid.

Some business owners said that they had been denied the opportunity to bid on projects, or had knowledge of this happening. [e.g., #TO1] A few reported denial to bid as more common in private sector; others reported evidence in public sector procurement, for example:

- A white male representative of a majority-owned engineering firm indicated that he is aware of some smaller firms in the private sector being denied the opportunity to bid. [#39]
- A white male representative of a trade organization reported that he has knowledge of firms being denied the opportunity to bid in the private sector. [#TO2]
- The white female owner of a DBE-certified design firm reported that some agencies have gone to a prequalification roster that includes at least twenty firms; the top three picks provide proposals for projects. She added that on the county level, there have been two RFPs this year that interested her firm; however, a county representative told her not to bid because there was a preferred incumbent and no plans to hire another firm. [#26]
- A white female owner of a DBE-certified specialty contracting business replied she experienced a denial to bid. She explained that the State had put out a bid for a contract that highly interested her. The State had a bid date, which they changed and her firm did not receive notification of the change. The State's explanation was that there was a "glitch" in the system. Thus, not everyone was aware of the bid date change and the State did not rebid the project. [#32]
- When asked if the firm has ever been denied an opportunity to bid on a project, the white female owner of a DBE-certified specialty contracting business responded, "Yes, because we were not big enough." She commented that to bid on MDT projects, a firm needs pre-approval (for certain tasks). She added that even having pre-approval, MDT seems to hire the same larger firm. [#1]

However, most interviewees indicated that they no denial of opportunity to bid. [e.g., #3, #4, #6, #7, #9, #15, #16, #17, #18, #19, #20, #21, #22, #25, #27, #28, #29, #30, #31, #33, #36, #40, #41] Examples include:

- When asked if the firm has ever been denied the opportunity to bid, a white male representative of a DBE-certified, women-owned specialty contractor responded, "No, I don't believe we have." [#2]

- The Native American female owner of a DBE-certified contracting business stated, "I don't think anyone's been denied to bid." [#35]

- A white male representative of a majority-owned engineering firm reported no denial of opportunity to bid. [#11]

- A white female owner a DBE-certified engineering and consulting firm reported no denial of opportunity to bid. However, she noted that she sometimes gets an indication ahead of time whether or not they will win a job. [#38]

Bid shopping and bid manipulation. Business owners and managers often reported being concerned about bid shopping and bid manipulation and the opportunity for unfair denial of contracts and subcontracts through that practice.

Many interviewees indicated that bid shopping and bid manipulation was prevalent in the Montana construction industry. [e.g., #1, #10, #14, #28, #30, #33] A few reported bid shopping and bid manipulation as more common in private sector; and others reported evidence in public sector. Examples of comments include:

- When asked about bid shopping, a white male representative of a trade organization reported that he has heard from members that bid shopping and bid manipulation are a problem in the private sector. [#TO1]

- A white male owner of a SDVOSB-certified engineering firm reported that he has not witnessed bid shopping in the public sector, but it happens "all of the time" in private sector. [#9]

- The white female owner of a DBE-certified specialty contracting business reported that bid shopping exists in the private sector, and she suspects that it happens in the public sector. [#27]

- When asked if he encountered bid shopping, a white male representative of a woman-owned specialty contracting firm said, "Yes … I've seen it … in … private." [#23]

- A white male owner of a SDVOSB-certified engineering firm experienced "proposal shopping" and "proposal manipulation" in the private sector. [#9]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor commented that one must be naïve to think that bid shopping and bid manipulation do not go on in the industry. [#22]

- When asked about bid shopping, the white male owner of a DBE-certified specialty contracting business responded that he knows that bid shopping and bid manipulation happen. [#17]

- The Native American female owner of a DBE-certified contracting business said, "There's a lot of [bid shopping]." She added, "I think there's a lot of [bid manipulation] too." [#35]

- The white female owner of a specialty contracting business said, "That [bid shopping] happens and that's the reason that there are some contractors I do not give quotes to." [#36]

- When asked about bid manipulation, the white female owner of a DBE-certified design firm reported that it happens frequently, commenting, "Have you ever worked in eastern Montana?" [#26]

- The white female owner of a DBE-certified specialty contracting firm commented that she has experience with prime contractors "shopping" her bid. She added that primes have asked to provide shop drawings (as part of the bidding process); they then hire another firm using those drawings. She remarked that she no longer provides drawings prior to bid award. [#4]

- A white male owner of a majority-owned construction firm stated that they have contractors that shop their bids. He said, "Well I'd imagine there's lots of that going on …." He explained, "Well, I have bid on some that I knew was already 'rigged' … they had to put it out on bid because that was the rule … they had already selected who they wanted …." [#13]

- When asked about bid shopping, a white female owner a DBE-certified engineering and consulting firm reported that it rarely happens with primes. Instead, she stated that smaller contractors tend to shop bids. [#38]

- On the topic of bid manipulation, although a white male representative of a DBE-certified, woman-owned specialty contractor could not confirm bid manipulation, he indicated that the bigger the contract, the more chance for it to occur. [#27]

- A white female owner a DBE-certified engineering and consulting firm reported that, on occasion, her firm uses an "estimator" that is used by other firms. Those other firms sometimes match her bid "to the cent." [#38]

- A white female owner of a DBE-certified specialty contracting business reported that some individuals bid shop, and noted that there is currently a bill in the state that would make it illegal (it is illegal in other states). [#32]

A number of other businesses or representatives reported no experience with bid shopping or bid manipulation. [e.g., #3, #5, #6, #16, #18, #20, #25, #29, #31, #39, #40, #41, #TO2]

Unfair treatment and approval of work. The study team asked companies about difficulties getting work approved and other unfair treatment.

Several businesses reported issues getting approval of their work. For instance:

- A female representative of a majority-owned construction company commented that with a prime, if they have issues with an employee, approval of work could become difficult. [#20]

- A female representative of a majority-owned heavy construction business reported that they have had some issues with approval of work. Approval is inconsistent from inspector to inspector. [#15]

- A white male representative of a DBE-certified, women-owned specialty contractor reported having one issue with the State on the approval of work. He said, "When we do the job … it's approved …. Then you might get a punch list 60 days later and you got to go back and do … some … minimal stuff. Or actually, we've had jobs in the State of Montana, that a year after we've done the job, we get a 'deduct' because some material failed that we never even heard about." [#2]

  He reported that more commonly, the firm receives payment for the work before notification of a problem. He also said, "Sometimes the prime contractor knows [about the problem], but a lot of times they don't know either …." [#2]

Some businesses reported other unfair treatment. Comments include:

- A white female owner of a DBE-certified construction firm indicated that they have experienced unfair treatment by primes. [#30]

- The white female owner of a DBE-certified consulting firm reported having experienced workscope change without a commensurate change in budget. [#25]

- A white female owner of a DBE-certified engineering and consulting firm responded that when you are a consultant everything is your fault. She added that it is the norm that they dump stuff on you at the last minute. [#34]

- The white female owner of a DBE-certified design firm reported poor treatment on site involving her staff. For example, she indicated that an individual on the site unjustly called her female staff member "a sneaky snake." [#26]

- The Native American female owner of a DBE-certified contracting business reported that some MDT staff like certain companies better. She added that primes also have certain companies they like to work with as well. [#35]

- The white female owner of a consulting firm reported once experiencing unfair treatment on a public agency job in Montana. She indicated that she observed the prime's project manager in conflict with the federal agency, and added that the situation grew increasingly unpleasant for her; she ultimately excused herself from the project. [#21]

- When asked if they had ever experienced unfair treatment while performing work, the white female owner of a DBE-certified specialty contracting business reported, "A giant yes!" She commented that MDT inspectors and "hierarchy" are very uncooperative. She remarked, "It's like they're 'God' … common sense doesn't matter to them …." [#27]

One prime contractor reported having a DBE subcontractor that was unprepared to conduct the work required of them; this resulted in delayed MDT sign-off, for the prime. For example:

- A white male representative of a majority-owned specialty contracting business spoke of his experience with a DBE subcontractor on a large MDT project with DBE goals. The DBE had difficulty getting the work done. He added that his firm was approaching liquidated damages because of their delay. The interviewee reported that the firm had meetings with the DBE and offered advice on ways to improve performance. In addition, the firm held meetings with MDT to alert them of the problem with the DBE firm. A Native American male representative of the same firm added that the firm notified MDT that his firm was adding their own excavators to get the work done on time. When asked why the DBE underperformed, He responded that the DBE lacked skills and the right people. In addition, the project was too large as the DBE was used to smaller projects. [#5]

Some interviewees reported having no difficulty with approval of their work. [e.g., #19, #23, #26, #28, #31, #32, #35, #36] About an equal number reported no experience with unfair treatment. [e.g., #29, #31, #32, #39, #33, #36, #40, #41]

I. Information on Unfavorable Treatment that may have been Racial-, Ethnic- or Gender-based

Part G reports factors that specifically affect industry entry and advancement for minorities and women (or MBE/WBE/DBEs) including racial-, ethnic- or gender-based issues concerning:

- Stereotypical attitudes and unequal treatment;

- Unfavorable work treatment, environment or other factors affecting entry or advancement;

- Double standards; and

- "Good ol' boy" network or other closed networks.

Stereotypical attitudes and unequal treatment. The study team asked interviewees about whether or not they experienced or were aware of any stereotypical attitudes, unequal treatment or other forms of discrimination affecting minorities or women, or minority- and women-owned businesses.

Many reported on stereotyping of women and minorities in business. For example:

- A Native American male owner of a DBE-certified consulting firm reported that some city and county agencies as well as some private entities consider his firm "less qualified" since they are Native Americans. He noted that federal agencies did not seem to feel that way. [#6]

- The Native American female owner of a DBE-certified consulting firm stated, "And me as a woman, I've always said, 'I have to work; be smarter, work better, harder than a man in order for me to get the job.'" [#18]

- The white female owner of a DBE-certified specialty contracting business stated that in her line of work there are stereotypical attitudes on display when men call her firm and a woman answers and can give them information. She explained that men are surprised when she is able to help them, but the women she helps are not surprised. She reported that men who inquire about the firm's services question if the firm can actually perform the work, and ask who will do the work. [#1]

  She also commented on challenges working in her field with mostly men. She remarked that an architect told her that, when she bids on a job, he wanted her to be aware of the "attitudes" of the others involved with the project. When she inquired "why?" the architect responded, "Because you are a woman." The interviewee added that the architect, being aware of the attitudes of others, warned her in advance of doing the work. [#1]

- The white female owner of a DBE-certified specialty contracting firm reported that being female was a challenge for her when she started her firm; however, now she sees woman more accepted in the construction industry. She added that her female employees faced discrimination on jobs at business start-up about ten years ago. She further commented about her second business start-up. Although her female employees do not experience discrimination as much because there is more awareness of discrimination against women on the job, people still assume her husband is the boss. [#4]

  She also reported that that superintendents have the attitude that she should be "home with her children." Additionally, this woman business owner reported that there are also anti-Hispanic attitudes since the start of the 2016 presidential races. [#4]

- A white male owner of a majority-owned construction firm responded that he had seen stereotypical attitudes toward minorities and women on many different jobs. [#13]

- When asked about the disadvantages for a small business or a woman-owned business, the white male owner of a DBE-certified specialty contracting business gave an example: "If a general contractor were to flip open a phonebook and they're going to see a woman's face on one side of the book and a man's face on the other side, and they both say 'Construction: We Do It All,' I'd say that 90 percent of the time it's going to be the man's face that gets chosen … and that's the truth of the matter." [#17]

- The white female owner of a consulting firm remarked, in regard to her disagreement with a female project manager, a male Forest Service representative said, "You 'girls' just can't get along." [#21]

- When asked if she had ever felt a prime was refusing to work with her firm because it is woman-owned, the white female owner of a DBE-certified design firm commented that she has had difficulty negotiating contracts, however no prime would admit to it. She added that she experienced verbal references to gender during contract negotiations with large firms. [#26]

- The white female owner of a DBE-certified consulting firm responded that stereotypical attitudes exist regarding minorities. Some are also "hinted" at concerning women. [#29]

- When asked about any disadvantages or stereotypical attitudes toward small or minority-owned businesses, the white female owner of a DBE-certified specialty consulting firm stated that there is a common misconception that they are not as capable as larger, more established companies. [#37]

- When asked about stereotypical attitudes about minorities or women, a white female owner a DBE-certified engineering and consulting firm stated, "… you get the general [kind of] stuff on a construction site of, 'Oh, there's a girl out here, she doesn't know anything.'" [#38]

- A white female owner of a DBE-certified engineering and consulting firm commented that there are still stereotypical attitudes toward minorities and women. She then recalled that someone from DEQ referred to diversity programs as a "whiny thing," and that some people assume that she gets jobs because she is a female. [#34]

- When asked about the presence of stereotypical attitudes in the workplace, the white female owner of a specialty contracting business stated, "… I always think there is a little bit of it out on the jobsites …. I just think it's always going to be there a little bit." [#36]

- The white female owner of a DBE-certified specialty contracting business commented that her husband is the "face of the firm," and that if she were to speak to the clients the way he does, she would be called a "bitch." She went on to say that she hears the only way her firm is getting work is because they are a certified DBE. [#27]

- On the topic of stereotypical attitudes about minority- or women-owned firms, a white female owner of a DBE-certified specialty contracting company reported that male contractors sometimes "get upset" because they think they are at a disadvantage. Her firm sometimes receives work even if they are not the low bidder. [#40]

- The Native American male owner of a DBE-certified specialty contracting company indicated that early on, working on a subcontract for an MDT roadwork project was a "tough go" for the firm, because two MDT representatives told him that they do not believe in DBEs. He added that although he hates to say it, the firm experienced discrimination. When asked why the firm is not bidding many MDT projects, he responded that that treatment of the firm is "unfair." [#7]

  He went on to report that his firm likely did not win a municipal job because it is Native American-owned; he added that the firm was even low bidder for the job.

  He also noted that, while there are still stereotypical attitudes about minorities and women he encounters them less often. [#7]

Some reported no experience with stereotypical attitudes. [e.g., #5, #9, #11, #14, #15, #20, #23, #31, #32, #39, #TO2] Examples include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that he has not witnessed any stereotypical attitudes about minorities or women. [#2]

- When asked if he had ever encountered any stereotypical attitudes about minorities or women, a white male representative of a woman-owned engineering firm said, "Not really." [#28]

- The Native American female owner of a DBE-certified contracting business commented that she has never heard anyone say "anything bad" about a minority company. [#35]

- A white male owner of a majority-owned specialty contracting firm reported no knowledge of stereotypical attitudes about minorities or women in the workplace. [#41]

Unfavorable work treatment, environment or other factors affecting entry or advancement. The study team asked interviewees about experiences with unfavorable work treatment, hostile environments and other factors that may affect the success of small and women- or minority-owned businesses.

Many firms, including small businesses and women- and minority-owned businesses, reported of unfavorable treatment and other challenges. [e.g., #10, #26, #39] For example:

- The white female owner of a DBE-certified specialty contracting firm said that the same primes treat her as if she does not know what she is doing. [#4]

- The white female owner of a DBE-certified specialty contracting firm remarked that port-a-potties are unfavorable for women; she described them as "vile" and "filthy," and stated that they have disturbing racial and sexist graffiti on their walls. [#4]

- A white male owner of a majority-owned construction firm reported that he had witnessed race- and gender-based unfavorable treatment in the past. He stated, "There was a terrible verbal problem … cussing out [because] she was a female …." He went on to report that this has since gotten better. [#13]

- A female representative of a majority-owned heavy construction business reported that some people have chosen not to speak to her outside of her office; she recalled an instance where an architect refused to address her, and mentioned that this was 'bewildering" to her. [#15]

- The white female owner of a DBE-certified consulting firm reported that the challenges she faced stemmed from working with those who have been around a long time, and who have the mentality that they are not going to take orders from someone who is a new business owner. She added that she does not know if this attitude was because she was younger, or because she is a woman. [#24]

- When asked about unfavorable work environment, a white female owner of a DBE-certified construction firm replied that she had experienced it. For example, it can range from no outhouses on the jobsite to suppliers calling her names because she is a woman. She added that she was called the "C" word. The interviewee further stated she thought the reason behind this behavior was that they would try anything to make her flustered so that she would "screw up." She commented that this happened years ago and it has gotten better since they "weeded out" the suppliers they do not like. [#30]

- A white female owner a DBE-certified engineering and consulting firm reported that some primes still see women-owned businesses as not being as competent as their majority-owned counterparts. [#38]

- The white female owner of a DBE-certified consulting firm reported that if she performs work in the field, it is required to have a second person present. She did not know if this was because she is a woman or if it was because of her age. [#33]

- When asked about unfavorable work environments for minorities or women, a white male representative of a trade organization commented that much of the unfavorable treatment is "hidden" and "not obvious" at first. [#TO2]

However, others reported not encountering any unfavorable work environments. [e.g., #3, #5, #6, #7, #8, #9, #14, #18, #20, #22, #23, #25, #27, #28, #29, #31, #32, #34, #35, #37, #40] Comments include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported not experiencing any unfavorable work environments for minorities and women. [#2]

- When asked about his experience with unfavorable treatment for women or minorities, a white male owner of a majority-owned construction firm commented that in the last ten years it has been "really good." There are entities that watch for it; he added, "It's just not permissible to do that …." [#13]

- When asked if she had encountered any unfavorable work environments, the white female owner of a specialty contracting business responded, "No, I don't think so." She added that if the minority- or women-owned firm does a good job for the contractor, then there are no issues. [#36]

- A white male owner of a majority-owned specialty contracting firm reported no knowledge of unfavorable work environments for minority- or women-owned firms. [#41]

- A white male representative of a trade organization reported that he is unaware of any unfavorable work environments or other factors that affect minorities or women in the workplace. [#TO1]

Double standards. Some firms reported experiencing times when, because of their status as a small or women- or minority-owned business, primes or public agencies held them to a different standard than other firms. For example:

- The Native American male owner of a DBE-certified specialty contracting company reported experiencing double standards while working on some projects. [#7]

- When asked if she ever encountered double standards from a client or a prime contractor, the white female owner of a consulting firm commented, "Not overtly … but double standards do exist for women in the workplace." [#21]

- When asked if she has experienced any disadvantages specific to being women-owned business, the white female owner of a DBE-certified specialty consulting firm said that Montana seems "less evolved" than more progressive places such as Seattle. She added, "On the whole, these companies are less evolved for training, period [making it especially difficult for women] …." [#37]

- The white female owner of a DBE-certified design firm reported that women-owned firms are required to be successful and are given "one chance" to do it right. She added that if that one chance "is blown" the odds are a woman will not "… get back into the game." She added that there is far less of an opportunity than a traditional company would have. [#26]

- When asked if there are any double standards for minorities or women, the white female owner of a DBE-certified specialty consulting firm commented, "Absolutely, women and minorities are viewed as 'lower than [non-women, non-minorities]' … [and they] have to prove themselves more …." [#37]

- A white female owner of a DBE-certified construction firm replied that there was double standard for small vs. large firms. [#30]

Many interviewees had limited or no awareness of double standards. [e.g., #3, #5, #6, #8, #11, #14, #15, #17, #18, #19, #20, #22, #23, #25, #27, #28, #29, #31, #32, #39, #33, #34, #35, #36, #40, #41, #TO2] Several comments follow:

- A white male representative of a DBE-certified, women-owned specialty contractor reported not seeing any double standards for minority- or women-owned firms when preforming work on the job site. [#2]

- When asked if she had ever seen any double standards for minority- or women-owned firms or small businesses when performing work, the Native American female owner of a DBE-certified consulting firm said "not to my knowledge." [#18]

- A white male representative of a trade organization reported that he is unaware of any double standards affecting women- or minority-owned businesses. [#TO1]

"Good ol' boy" network or other closed networks. The study team asked business owners and representatives about their experiences with any "good ol' boy" networks or other closed networks.

Many business owners and representatives reported experience with "good ol' boy" networks or other closed networks. [e.g., #10, #17, #19, #27, #29, #33, #38, #40] Comments from the in-depth interviews include:

- When asked about any "good ol' boy" networks, a white male owner of a majority-owned construction firm replied, "Oh yeah!" and added that it is still something that happens. [#13]

- When commenting about "good ol' boy" networks, a white female owner of a DBE-certified construction firm said, "Oh, [they are] everywhere, especially in this field." [#30]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that there are definitely forged relationships that have been in place for many years. [#22]

- A white female owner of a DBE-certified specialty contracting business commented that closed networks are prevalent; it stems from how long a firm is in business, how many people are familiar with that business and want to work with that firm. [#32]

Some business owners and representatives reported difficulty breaking through closed networks to conduct work in Montana. For example:

- The white female owner of a DBE-certified consulting firm reported that there is a "good ol' boy" network present; it is "the culture" in Montana. She further stated that the closed network is part of the reason firms have difficulty breaking into the Montana market. [#24]

- A white male owner of a SDVOSB-certified engineering firm reported "good ol' boy" networks (mostly) in municipalities; he called them "cliques." He said, "Trying to get into the 'clique' is tough to do." [#9]

- When asked about challenges as a woman-owned business in the public sector, the white female owner of a DBE-certified specialty contracting business remarked that she finds it "clique-y." She added that in the construction industry, customers like to "deal where they are dealing." She said "yes" when asked if "cliques" are similar to a "closed network." She commented that it is very hard and takes years of visiting and contacting engineering firms and contractors to break through the network. She added that if she "is not golfing with them" they forget about her firm. [#1]

- When asked if there is a "good ol' boy" network, a white female owner of a DBE-certified engineering and consulting firm said, "It is huge – it definitely exists." She reported that getting work often depends on access to networking opportunities. She just knows she is not going to get the jobs that are up for discussion "while golfing at the country club or in the locker room at the gym." [#34]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that some companies "work with certain subs … they have a … working relationship …." [#2]

- The white male owner of a consulting firm expressed that he has seen the "good ol' boy" network; it does happen. He added that the "good ol' boy" network is a closed network; some companies go with whom they have always used and continue to use. "Favoritism" drives those networks. [#14]

- The white female owner of a consulting firm commented, "Oh, there are 'good ol' boys' in Montana, too." She added that when she was younger, it was more challenging than now; she has since developed relationships with the "good ol' boys." [#21]

  The same white female owner of a consulting firm noted that since she [a woman] knows closed networks exist, she must learn to work around them (e.g., by finding an advocate or by proving to the "good ol' boys" that women are "okay"). [#21]

Some specifically reported that closed networks advantage some while disadvantaging others. Comments include:

- The white female owner of a DBE-certified design firm indicated that opportunity to network is a challenge; a "good ol' boys" club definitely exists in Montana. She added that long-term family relationships exist as closed networks and give advantage to those in "the right circles." She added that although her firm is in some "circles," they have better luck pursuing public sector projects. [#26]

- A white male owner of a majority-owned specialty contracting firm commented that "good ol' boy" networks do still exist, though they tend to be restricted to the private sector. He went on to indicate that closed networks have negative impacts on minorities and women. [#41]

- The white female owner of a DBE-certified consulting firm reported the existence of closed networks commenting, "I would say definitely … that's there." She added that closed networks have a negative effect on women in the industry. [#25]

- On the topic of "good ol' boy" networks, a white male representative of a majority-owned engineering firm reported that he is aware of a "past partner's network" that included businesses with previous experiences with each other. [#39]

- The Native American female owner of a DBE-certified contracting business, when asked if there is a "good ol' boy" network or other closed networks, she responded, "Oh, I'm pretty sure there's that." She went on to say it affects everyone outside of the network. [#35]

- When asked if he had ever experienced any closed networks, a white male manager of a majority-owned engineering firm commented, "No … except for MDT." Another white male manager of the same firm added that there might be a need for "new blood" in MDT. [#8]

Some were aware of "good ol' boy" and other closed networks, but had not experienced them first hand. For example:

- The white female owner of a DBE-certified specialty contracting firm indicated there is "plenty of that [closed networks] goes around." However, she added that she has not personally experienced any closed networks as it is easy for her to get along with most people. [#4]

- When asked if there were any "good ol' boy" networks, The Native American male owner of a DBE-certified specialty contracting company stated, "My gut feeling is … some still goes on." [#7]

- When asked about the existence of "good ol' boy" networks, a white male representative of a DBE-certified woman-owned contractor responded that he was sure that they exist, but he did not have specific knowledge. [#31]

A few business owners reported less opportunity now for closed networks than in the past. These reported that closed networks could be diminishing.

- When asked if there were any "good ol' boy" networks, the white female owner of a specialty contracting business replied, "I don't think so anymore 'no.'" [#36]

- The white female owner of a DBE-certified specialty contracting business reported that there is currently no opportunity for closed networks in her segment of the industry. [#3]

- When asked about "good ol' boy" networks, the white female owner of a DBE-certified specialty consulting firm reported that while they do still exist, they were much more common in the past, especially in the 1980s when she first started working in Montana. [#37]

- The Native American female owner of a DBE-certified consulting firm commented that MDT was a closed network before they hired a female field manager in the Great Falls district. "It changed the complexity of everything; the 'good ol' boy' was no longer there." [#18]

Very few businesses reported no experience with or knowledge of "good ol' boy" networks or other closed networks. [e.g., #6, #23]

J. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures

The study team asked businesses and other industry representatives to discuss current and potential business assistance programs and contracting processes, including those offered or potentially offered by MDT or other public agencies, trade associations and other organizations.

Information gathered included comments on knowledge and utilization of certain business assistance programs, and potential for improvements.

- Technical assistance and supportive services;

- MDT's reimbursement program for DBEs;

- MDT's DBE focus group;

- On-the-job training programs;

- Mentor-protégé relationships;

- Joint venture relationships;

- Financing assistance and bonding assistance;

- Assistance in obtaining business insurance;

- Assistance in using emerging technology;

- Other small business start-up assistance;

- MDT quote request system;

- MDT state directory;
- MDT workshops;
- Recommendations for improvement of their contracting processes;
- Online bidder registration;
- Directory of potential subcontractors;
- Pre-bid conferences;
- Distribution of lists of planholders;
- Other agency outreach;
- Streamlining or simplification of bidding procedures;
- Unbundling;
- Price or evaluation preferences for small businesses;
- Small business set-asides;
- Mandatory subcontracting minimums;
- Formal complaint and grievance procedures; and
- Access to information.

Technical assistance and supportive services. Business owners and representatives reported on their knowledge of and experience with technical assistance and supportive services in Montana.

Many interviewees knew of programs and found them useful, or indicated interest in learning more about them. [e.g., #6, #22, #25, #26, #38, #40] For instance:

- A white male representative of a DBE-certified, women-owned specialty contractor reported having taken advantage of technical assistance and supportive services. He reported that the two owners went to several DBE-sponsored networking and employee related classes/seminars. [#2]
- When asked if she had taken advantage of technical assistance and supportive services, the white female owner of a DBE-certified specialty contracting business said, "Yes." She reported that she attended classes on workers compensation. [#1]
- The white female owner of a DBE-certified specialty contracting firm reported having taken a two-day DBE class on website building. [#4]

- A white female owner of a DBE-certified specialty contracting business stated that she has attended a few seminars and she signed up for the upcoming summit in February. She added that they support SafetyFestMT; every employee is required to participate in the 30-hour OSHA class for general construction. [#32]

- The white female owner of a DBE-certified specialty contracting business indicated that System for Award Management (SAM) was helpful. [#3]

- A white male representative of a woman-owned specialty contracting firm reported assistance with learning about blueprints on CDs versus internet. [#23]

- The Native American female owner of a DBE-certified supplier commented that she did attend a meeting that discussed where one could apply for grants. She also indicated that she might need some assistance with updating her website and that was part of the reason she was trying to contact the DBE. [#19]

- A white male owner of a majority-owned construction firm responded that they get brochures and flyers; most technical assistance comes from the union. [#13]

Some business owners had not recently taken advantage of supportive services, or reported limited benefits from participation. For example:

- The Native American female owner of a DBE-certified consulting firm reported that she has not used technical assistance and support services yet because she is just learning what is out there. [#18]

- The Native American male owner of a DBE-certified specialty contracting company reported having taken advantage of technical assistance and support services in the past but not recently. [#7]

- The white female owner of a DBE-certified specialty consulting firm reported that she used technical assistance programs in the past to benefit her firm. [#37]

- The Native American female owner of a DBE-certified contracting business reported that she has used technical assistance programs and support services "in her younger years," and has gone to seminars; however, she does not attend them regularly because they have become "redundant." [#35]

- The white female owner of a specialty contracting business indicated she has heard of technical assistance programs and support services, but at start-up, she had to learn on her own. She explained that the hands-on experience was the best thing for her. [#36]

- The white male owner of a DBE-certified specialty contracting business reported that he had taken a class but there is a "smokescreen" there, meaning that they can participate in these programs but they do not lead anywhere. [#17]

- The white female owner of a DBE-certified consulting firm mentioned she has taken advantage of assistance and support services. She added that, regarding MDT, a lot of the assistance for DBEs leans to the construction side, which her firm does not typically work with. Therefore, she does not take advantage of most DBE assistance programs. [#33]

Many business owners and representatives reported no knowledge of technical assistance and supportive services programs. [e.g., #5, #8, #9, #10, #11, #14, #16, #27, #29, #39, #41, #TO2].

MDT's reimbursement program for DBEs. Business owners reported on their experiences with MDT's reimbursement program.

Some business owners indicated taking advantage of MDT's reimbursement program for DBEs. [e.g., #6, #7, #24, #26, #27, #29, #30, #32, #33, #38, #40] Comments include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the firm has taken advantage of MDT's reimbursement program for DBEs, although he is not sure to what extent. [#2]

- The white female owner of a DBE-certified specialty consulting firm reported that she has used MDT's reimbursement program and benefitted significantly from it. She went on to say that she greatly appreciates the difference it made for her firm. [#37]

- The white female owner of a specialty contracting business indicated that she has used MDT's reimbursement program. She added that a couple of years ago she used it to do some advertising, which she would not have done otherwise because she considered advertising an "extra." [#36]

- The white female owner of a DBE-certified specialty contracting business reported that MDT reimburses DBE firms for travel to classes and conferences; she has taken advantage of the program. [#1]

Some reported having either no knowledge of, or no experience with MDT's reimbursement program. [e.g., #3, #4, #5, #9, #10, #13, #22, #28, #39, #41, #TO2] For example:

- The Native American female owner of a DBE-certified contracting business said she has not used the reimbursement program, but she is aware of it and knows of companies that use it. [#35]

- The white female owner of a DBE-certified consulting firm reported that she is aware of the reimbursement program, but has not used it. [#25]

MDT's DBE Focus Group. Business owners and representatives of some businesses reported on MDT's DBE Focus Group. Some who received invitations declined.

Some business owners and representatives reported knowledge of MDT's DBE Focus Group, whether they had participated, or not participated. [e.g., #6, #7, #17, #26, #32, #38] Examples include:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the firm participated in a DBE Focus Group a few times when associated with another event. However, the firm did not participate in a stand-alone DBE Focus Group; it was not a good return on investment. [#2]

- The white female owner of a DBE-certified specialty consulting firm reported that while she did receive an invitation to MDT's Focus Group, she had to decline because of her busy schedule. (She indicated not knowing much about the focus groups.) [#37]

- The Native American female owner of a DBE-certified contracting business commented that she is aware that MDT's DBE Focus Group exists as she received an invitation to participate but she had to decline. [#35]

- When asked about MDT's DBE focus group, a white female owner of a DBE-certified specialty contracting company stated that while she is aware of the program, she has never participated in it. [#40]

- When asked if she has participated or taken advantage of MDT's DBE Focus Group, the white female owner of a DBE-certified specialty contracting business said, "No." She reported that she does not have time, especially in the summer and indicated that the DBE Focus Groups are not in her area. [#1]

Some reported having either no knowledge with, or no experience with MDT's DBE focus group. [e.g., #3, #4, #9, #10, #16, #18, #22, #24, #25, #28, #29, #36, #39, #41, #TO2]

On-the-job training programs. The study team asked business owners and representatives to discuss their knowledge of and experience with on-the-job training programs.

Several business owners reported on their experience with on-the-job training programs including, for one, an in-house program for employees, and, for another, training administered by her insurance agency and WorkSafeMT. [e.g., #7, #17] For example:

- The Native American female owner of a DBE-certified contracting business reported that she is aware of on-the-job training programs and receives emails about them. [#35]

- A white male representative of a majority-owned specialty contracting business reported that the firm has done "in-house," on-the-job training with their own employees. [#5]

- When asked about on-the-job training programs, a white female owner a DBE-certified engineering and consulting firm reported that her firm participates in on-the-job training classes. She indicated that the classes are through their insurance agency, and that she is aware of the WorkSafeMT program. [#38]

Many interviewees reported having either no knowledge of or no experience with on-the-job training programs. [e.g., #3, #4, #6, #9, #10, #11, #19, #21, #24, #37, #30, #31, #32, #36, #40, #41, #TO2]

Mentor-protégé relationships. For many business owners and representatives, mentor-protégé relationships were not top of mind. Only a few had experience with these relationships.

A few interviewees described first-hand experience with mentor-protégé relationships, a few others knew of the program. [e.g., #26] Comments include:

- The white female owner of a DBE-certified specialty contracting business reported that she received six months of mentoring (and took DBE classes). [#1]

- The white female owner of a DBE-certified specialty consulting firm reported that she participated in a mentor-protégé program many years ago, and that he found it to be a "great program." [#37]

- A white male representative of a trade organization indicated that he has heard about mentor-protégé relationships from membership firms. [#TO2]

- The Native American female owner of a DBE-certified consulting firm commented that she is aware of mentor-protégé relationships, but has not participated in one. [#18]

Many interviewees reported no knowledge of mentor-protégé programs. [e.g., #3, #4, #6, #7, #9, #10, #11, #19, #21, #24, #25, #28, #29, #31, #32, #36, #40, #41]

Joint venture relationships. Some business owners and representatives had first-hand experiences with joint ventures; others had limited knowledge or no experience.

Others reported joint venture experiences, or a desire to learn more about joint venture opportunities. Comments include:

- A Native American male owner of a DBE-certified consulting firm reported attending conferences on joint ventures. [#6]

- The Native American male owner of a DBE-certified specialty contracting company attended a seminar on joint ventures. [#7]

- When asked about joint venture relationships, The Native American female owner of a DBE-certified consulting firm reported that they have talked about it, and now she is starting to go to more workshops, as she now has the time to consider this option. [#18]

- The Native American female owner of a DBE-certified supplier said that, while she had no experience with joint venture relationships, "I have thought about it." [#19]

- When asked about joint venture relationships, the white female owner of a DBE-certified specialty consulting firm commented that while she has not participated in any joint ventures yet, she is "all for collaboration." [#37]

A number of firms reported having little to no knowledge of joint venture relationships. [e.g., #3, #4, #9, #10, #24, #25, #32, #38, #39, #36, #40, #41, #TO2] Many indicated "no" or "none," for example:

- The white female owner of a DBE-certified specialty contracting business reported no experience with joint venture relationships; when asked if she had any knowledge of or experience with joint venture relationships she said, "No." [#1]

Financing assistance and bonding assistance. Some business owners had sought financing assistance and bonding assistance; others had limited knowledge or experience.

Some business owners and representatives reported knowledge of such programs, including classes on financing and bonding, SBA loans and bonding assistance and other assistance. [e.g., #7, #26]. Comments include:

- The white female owner of a DBE-certified specialty contracting business reported taking classes on bonding. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that when the company first launched, it participated in financial and bonding assistance programs. He noted, 'Basically, when we started, that was probably the only way we got bonded on some jobs." [#2]

- A white male representative of a majority-owned engineering firm reported that the firm received an SBA loan to help them build their office building. [#11]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported utilizing an SBA bonding program. [#22]

- A white male representative of a woman-owned engineering firm reported being aware of SBA loans and "Great Falls financing assistance programs," but was unaware of any bonding assistance programs.

- A white female owner of a DBE-certified construction firm commented regarding acquiring financial assistance, "It's pretty tough." [#30]

- A white female owner of a DBE-certified specialty contracting business was in favor of financing and bonding assistance. She reported that when they were trying to get a line of credit through their bank, it would not work with them. Subsequently, they switched banks and then they were able to "get the dollar amount for the operating line of credit." [#32]

Many firms stated that they had no knowledge of or experience with finance and bonding assistance programs. [e.g., #3, #4, #6, #9, #10, #13, #17, #19, #21, #23, #25, #29, #37, #31, #38, #39, #35, #36, #40, #41, #TO2]

Assistance in obtaining business insurance. The study team inquired about business owners' and business representatives' experience with business insurance-related programs.

Several business owners' and business representatives did not need assistance or relied on information they gathered from business insurance providers. [e.g., #7] Comments include:

- A white female owner of a DBE-certified construction firm indicated she did not require assistance obtaining business insurance. [#30]
- A white male representative of a DBE-certified, women-owned specialty contractor reported not having assistance obtaining business insurance. He said that there are certain private sector insurance agents, and the firm reached out to them. [#2]
- The white female owner of a DBE-certified consulting firm reported having spoken to a representative regarding obtaining business insurance when she started the firm. [#25]

Many reported no knowledge of or no experience with programs that assist with business insurance. [e.g., #3, #4, #6, #9, #10, #19, #21, #24, #28, #37, #31, #38, #39, #35, #36, #40, #41, #TO2] One business owner would take advantage of this assistance, for example:

- The white female owner of a DBE-certified specialty contracting business reported a desire to have a class in obtaining business insurance. [#1]

Assistance in using emerging technology. Some business owners and representatives reported experience with assistance regarding emerging technology.

Some business owners and representatives reported that they had benefited from or would benefit from assistance using emerging technology, one reported cutting-edge knowledge already. [e.g., #17, #36] Comments from the in-depth interviews include:

- While discussing assistance using emerging technology, a white male representative of a woman-owned engineering firm stated "we used a training grant [for assistance in using emerging technology] … through the State of Montana … specific to our industry." [#28]
- The white female owner of a DBE-certified specialty contracting business reported experience with assistance in using emerging technology; she said, "Yes." She reported experience with e200 Montana, and social media and website building classes, and commented that she would also benefit from classes in e-commerce. [#1]
- The Native American female owner of a DBE-certified supplier mentioned that she could use help with advancing her website; however, she was not interested in learning how to do it herself. [#19]

- The white female owner of a DBE-certified specialty consulting firm reported that while she is aware of assistance in using emerging technology, she has yet to take advantage of it. [#37]

- The white female owner of a DBE-certified design firm noted that her firm did not need assistance using emerging technology, saying "we're … usually hired because were on the 'edge' … of emerging technology." [#26]

Many firm owners and representatives said they did not know about or had not received assistance in using emerging technology. [e.g., #3, #4, #6, #7, #9, #10, #11, #18, #24, #25, #29, #30, #38, #39, #33, #35, #40, #41, #TO2]

Other small business start-up assistance. The study team asked business owners and representatives it they had experience with other small business start-up assistance.

A few business owners and representatives reported experiences with other assistance programs. For example:

- The white female owner of a DBE-certified specialty consulting firm reported that she uses the Big Sky Economic Development Business Expansion and Retention (BEAR) program. [#37]

- The white female owner of a DBE-certified specialty contracting business commented that she applied unsuccessfully for federal start-up grants; consequently, she relied on family for financing. [#3]

- The white female owner of a DBE-certified specialty contracting firm reported that she had experience with fraudulent grant funding, which she turned in to the FBI. [#4]

Several others reported no knowledge of other small business start-up assistance. [e.g., #38, #36, #40, #41]

MDT quote request system. A number of business owners and representatives reported use of the MDT quote request system. Some had not.

Some firms reported making use of the MDT quote request system. [e.g., #17, #22, #26, #27, #35, #36, #38, #39, #40] For example:

- The white female owner of a DBE-certified specialty contracting business reported that she used parts of the MDT quote request system at start-up and for bidding. [#3]

- A female representative of a majority-owned heavy construction business noted that her firm uses the MDT quote request system on everything they bid publicly. [#15]

- A female representative of a majority-owned construction company commented that they use the website frequently for bidding, forms, EEO, and other business. [#20]

- A white male representative of a DBE-certified, women-owned specialty contractor reported using the MDT quote request system. He said, "We get the deals from the DBE … the primes … put in, and we're on the list to get all of those …. It does [help the firm receive work]." [#2]

Others also made comments. For example:

- A Native American male owner of a DBE-certified consulting firm reported being interested in learning more about the MDT quote request system. [#6]

- A white male representative of a trade organization reported that while he has heard of the service, he does not think that members would use it. [#TO2]

Some interviewees reported no knowledge or experience with the MDT quote request system. [e.g., #1, #4, #7, #8, #9, #10, #14, #16, #18, #19, #24, #25, #28, #32, #37, #41]

MDT state directory. When asked if they make use of the MDT state directory, some business owners and representatives had, others had not.

Some business owners and representatives reported awareness, had DBE listings or had taken advantage of using the MDT state directory in some way. [e.g., #3, #6, #7, #15, #22, #27, #35, #36, #38, #39, #41, #TO2] Comments include:

- The white female owner of a DBE-certified design firm, when speaking about the MDT state directory commented, "I'm aware of it." [#26]

- When asked about her experience with the MDT state directory, the white female owner of a DBE-certified consulting firm said, "I've looked at it." [#24]

- The white female owner of a DBE-certified specialty consulting firm reiterated that she is in MDT's directory for DBE providers. [#37]

- The white female owner of a DBE-certified specialty contracting firm reported that she is on and receives contacts via the DBE directory. [#4]

- The white female owner of a DBE-certified specialty contracting business reported a listing in the MDT state directory; she said, "Yes [we use it]." [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported often using the MDT state directory online for specific types of jobs and prime contractors. [#2]

A number of firms reported no experience with or now use of the MDT state directory. [e.g., #9, #10, #14, #18, #23, #25, #28, #40]

MDT Workshops. Many business owners and representatives reported experience with MDT workshops; however, others seldom attended or had no experience with workshops.

Many noted that MDT workshops had been helpful for them. [e.g., #2, #5, #6, #7, #17, #18, #19, #22, #23, #24, #26, #27, #30, #36, #38, #40] For example:

- The white female owner of a DBE-certified consulting firm commented that she planned to attend a DBE workshop scheduled in a couple months. [#24]
- The white female owner of a DBE-certified specialty contracting business reported that MDT workshops are very helpful to her business. She added that the classes keep her focused on her business plan. [#1]
- The white female owner of a DBE-certified specialty contracting business commented that the DBE Program marketing workshop is very helpful. [#3]
- A white male owner of a majority-owned specialty contracting firm reported that he participated in MDT's EEO workshop, and indicated that it was helpful. [#41]
- The Native American female owner of a DBE-certified consulting firm indicated that before she joined the Native American Development Corporation (NADC), MDT has excellent teaching seminars (if you can afford to get to them); "You learn so much, it is unreal." [#18]

Several business owners and representatives reported being aware of MDT workshops, but seldom or never attended one. For example:

- The white female owner of a DBE-certified consulting firm reported that while she and her firm are aware of them, they have never attended any. [#39]
- A white male representative of a trade organization reported that he is aware of the workshops, but his members do not attend. [#TO2]
- The white female owner of a DBE-certified consulting firm stated she had attended a few seminars, but found them geared to the construction industry. [#25]
- The white female owner of a DBE-certified consulting firm reported that MDT has a lot of training sessions and meetings, but they must be very important for her take time off work to attend them. Instead, she added that she looks on the internet or reads a book to learn what she needs. [#29]

Some business owners and representatives reported having no experience with MDT workshops. [e.g., #4, #9, #10, #14, #20, #28, #35, #37]

One offered several recommendations regarding the workshops. For example, a comment from one business owner follows:

- A white female owner of a DBE-certified construction firm had several recommendations for improving workshops. She said that MDT should use a systematic, "hands-on" approach (such as a "mock bid" workshop) as opposed to teaching difficult concepts via PowerPoint. She reported specific needs as potentially helpful including: how to do a digital signature, how to go through the process of bidding, and how to do certified payroll. [#30]

Recommendations for improvement of contracting processes. The study team asked interviewees for recommendations on how MDT and other public agencies can improve contracting and operating processes.

Several business owners commented on areas for improvement or reported confusion over the processes. Many felt they simply did not have enough information about contracting processes, or wanted to see more transparency. For example:

- The Native American female owner of a DBE-certified supplier reported the need to improve the MDT contract processes noting, "We are kind of in the dark on that." [#19]

- To assist him in bidding, a Native American male owner of a DBE-certified consulting firm wanted to learn about MDT protocols for scoring of firms. [#6]

- The white female owner of a DBE-certified consulting firm commented that she would like to understand more about the contracting process in order to be prepared. [#24]

- The white female owner of a consulting firm reported that government agencies have "really weird rules" about their financial management. She added that contracting rules are unique to each agency and are not necessarily transparent; having a person help small businesses work through those processes would be valuable. [#21]

- The white female owner of a DBE-certified design firm recommended that MDT's contracting process should be more transparent. She added that she has met with MDT staff that indicated that her firm could participate on certain projects. She reported that MDT did not subsequently ask her to bid. [#26]

Some noted a need for improved notification about projects, when they come up for bid. Comments include:

- A white male representative of a majority-owned specialty contracting business stated that other public agencies should advertise their projects more effectively on exchanges, emails and other ways. [#5]

- A white male representative of a DBE-certified woman-owned contractor suggested that it would be helpful to receive some sort of notification online when projects come available. [#31]

- A Native American male owner of a DBE-certified consulting firm commented that it would be helpful if many similar RFPs did not release one time. [#6]

Business owners and representatives had a number of comments that highlight the demands associated with submitting bids. These comments include:

- A white male owner of a SDVOSB-certified engineering firm reported that less regulation and scrutiny would be helpful; non-productive time is why he has not pursued MDT work. [#9]

- A white male representative of a DBE-certified, women-owned specialty contractor said, "I think so much of [the contracting processing] is regulated by law … I don't think [MDT or other public agencies] can do much changing … to make it easier anymore." [#2]

- A white male owner of a majority-owned construction firm described the process as "inconsistent." [#13]

- The white female owner of a DBE-certified specialty contracting business remarked that some public agencies do not provide enough time for contractors to prepare and submit bids. She added that insufficient time to bid is demanding for small businesses. [#1]

- A female representative of a majority-owned heavy construction business reported that having a single leader of a project would help, since the chain-of-command and knowing project status is confusing. [#15]

Online bidder registration. Interviewees discussed registering online with public agencies as a potential bidder.

Most business owners and managers reported that online registration would be useful. [e.g., #6, #7, #28, #37, #30, #33, #35] Comments include:

- The white female owner of a DBE-certified specialty contracting business reported not being aware of any online registration with public agencies as a potential bidder, but added, "I think that would be great." [#1]

- The white female owner of a consulting firm stated that online registration, as a potential bidder would be valuable. [#21]

- A white male representative of a woman-owned specialty contracting firm, when asked if he thought online registration with public agencies as a potential bidder would be useful, replied, "Yes, definitely." [#23]

- The white female owner of a specialty contracting business said that online registration as a potential bidder "would be good." [#36]

A few business owner and representatives felt that online registration would not be helpful. [e.g., #22, #25, #29, #41] For example:

- When asked about online registration with a public agency as a potential bidder, a white male representative of a majority-owned engineering firm responded, "I can't imagine it would accomplish much." [#11]

Some commented that online registration already occurs, or had experience with online registration. For example:

- The white female owner of a DBE-certified specialty contracting business noted that online registration "already occurs." [#27]

- The Native American female owner of a DBE-certified supplier stated that she thought the DBE program was supposed to have online registration with public agencies as a potential bidder. [#19]

- The white male owner of a consulting firm reported that MDT already allows online registration as a potential bidder. [#14]

- The white female owner of a DBE-certified specialty contracting firm reported that online registration was helpful on one project when working with one large contractor. [#4]

Directory of potential subcontractors. Business owners and representatives discussed the use of hardcopy or electronic directories.

Some business owners and representatives reported use of a hardcopy or electronic directories of potential subcontractors. [e.g., #5, #6, #7, #37, #33, #36]. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor said, "I think everything has gone to electronic [directories] now … and that works fine." [#2]

- The white female owner of a DBE-certified specialty contracting business commented that there is no difficulty with using the directories. [#3]

One business owner reported not knowing about the subcontractor directory, or had no need of such a directory. For example:

- When asked if there is a hardcopy or electronic directory of potential subcontractors, the white female owner of a DBE-certified specialty contracting business stated, "No … we do everything ourselves." [#1]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that a hardcopy or electronic directory of potential subcontractors would not be helpful to his firm. [#22]

- A white male representative of a woman-owned engineering firm said that a directory of potential subcontractors was not relevant to his firm. [#28]

Pre-bid conferences. The study team asked firms for their input on the usefulness of pre-bid conferences where subcontractors have an opportunity to meet prime contractors.

Many businesses stated that pre-bid conferences were useful, or expressed interest in attending them. [e.g., #7, #17, #19, #28, #37, #31, #36, #41] A few elaborated on why they thought pre-bid conferences were important. Comments include:

- Concerning the possibility of pre-bid conferences where subcontractors can meet prime contractors, the white male owner of a consulting firm said, "Certainly, that would be helpful." [#14]

- The white female owner of a DBE-certified specialty contracting business reported that her husband attends the pre-bids because of the site walk-throughs. [#1]

- The white female owner of a DBE-certified consulting firm reported that pre-bid conferences have potential to be useful, but the right prime contractors must attend. [#29]

- A female representative of a majority-owned heavy construction business said, "I think pre-bids are awesome, I think they are very important for successful communication …." However, she also commented that unless it is a huge project that everyone wants, only generals show up to see the competition. [#15]

- A Native American male representative of a majority-owned specialty contractor reported that pre-bid conferences are helpful but held mostly for TERO projects; not many pre-bid meetings are for MDT. [#5]

- A white male representative of a DBE-certified, women-owned specialty contractor reported attending some pre-bid conferences. He said, "A lot of times … the prime contractors like to see that you're there asking questions at the pre-bid … I think it … makes [them] … feel more confident in using you." He reported attending the pre-bid meetings as a way to hear the contractor's project schedule to see if the schedule coincides with his firm's workload. [#2]

- The Native American female owner of a DBE-certified consulting firm indicated that pre-bid conferences are starting to become more helpful. When pre-bids started years ago and she attended, she stated that the contractors did not want to meet or speak with her. The contractors were there because MDT instructed them to attend. She added that this was a long time ago, but she did not go back. Instead, her son, who does construction for the firm, goes to pre-bids and that seems to work well. She added, "I don't know if that's because he's a man and I'm a woman." [#18]

- A white female owner of a DBE-certified construction firm indicated that they attend pre-bids, but not all of the time. She added that it would be nice if MDT used webinars so that people who cannot physically attend can still be involved in the meeting. [#30]

A few reported that pre-bid conferences would not help them. [e.g., #3, #4, #6, #27] For example:

- The white female owner of a DBE-certified consulting firm reported that pre-bid conferences would help only if they were specific to her firm's focus. [#33]

- A white male representative of a woman-owned specialty contracting firm indicated he does not believe his firm would ever be interested in pre-bid conferences. [#23]

- According to The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor, pre-bid conferences would not be useful for his firm. [#22]

Distribution of lists of planholders. Business owners and managers discussed distribution of lists of planholders or other lists of possible prime bidders to potential subcontractors.

Some interviewees reported experience with, or interest in, list of plan holders or possible prime bidders. [e.g., #7, #17, #28, #37, #36, #41] Comments include:

- The white female owner of a DBE-certified specialty contracting business said that distribution of lists of planholders or other lists of possible prime bidders to potential subcontractors would be helpful. [#1]

- The white female owner of a DBE-certified specialty contracting business reported that the firm is on a planholders list in Billings; it is an additional source of information for her. [#3]

- The white female owner of a DBE-certified specialty contracting firm reported that plan holders' lists are helpful for requesting opportunities to provide an estimate. [#4]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the plan holders list is helpful to identify available bidding opportunities. He shared that the firm quotes multiple primes simultaneously. [#2]

- A white female owner a DBE-certified engineering and consulting firm reported that her firm receives lists of planholders via the Builders Exchange, and noted that the lists are helpful. [#38]

For a few, the planholders lists are not relevant; or not helpful as few primes place their names on those lists. His comment follows:

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the distribution of lists of planholders list of possible prime bidders was of no interest to his firm because it is well established. [#22]

- The white female owner of a DBE-certified consulting firm commented on her struggle to find out about primes that are bidding. She added that the bidder's list shows, which primes may be bidding, but not many firms place their names on the bidder's list. [#33]

Other agency outreach. The study team asked interviewees about their experiences and knowledge regarding agency outreach such as vendor fairs and events. Some reported no experience or interest in such events. [e.g., #6, #28, #41] Others showed support for them. [e.g., #2, #3, #7, #37, #31]

A few business owners and owners reported interest in or experience with other outreach events. For example:

- A white male representative of a majority-owned specialty contracting business called agency outreach such as vendor fairs "helpful." [#5]

- When the subject of agency outreach events like vendor fairs came up, the white male owner of a DBE-certified specialty contracting business commented, "I love those." [#17]

- When asked about other agency outreach, a white female owner a DBE-certified engineering and consulting firm commented that the SBA does well when it comes to networking, and noted that they give small firms the opportunity to meet with the DNRC and USDA. [#38]

Some commented that they had attended some event but questioned their usefulness; others doubted they would be able to attend. Comments to this effect include:

- The white female owner of a DBE-certified specialty contracting business reported attending outreach fairs in Helena and Billings; however, the firm did not get much follow-up from primes or meet other subcontractors. [#1]

- Interviewee# 4 indicated that she has attended conferences and paid for a booth in Helena; she received limited feedback. [#4]

- When asked about agency outreach programs such as vendor fairs, the white female owner of a specialty contracting business said, "I wouldn't use that, but someone else might." [#36]

- The Native American female owner of a DBE-certified supplier was not interested in agency outreach like vendor fairs and events, saying, "I wouldn't take the time." [#19]

- A white male representative of a woman-owned specialty contracting firm reported that he does not believe his firm would ever be interested in vendor fairs or events. [#23]

- When discussing agency outreach events such as vendor fairs, the white female owner of a DBE-certified consulting firm reported that location of the fairs makes it difficult for her to attend. [#25]

- The white female owner of a DBE-certified specialty contracting business reported that she does not have the time to attend fairs in the summer. A white male representative of the same firm added that vendor fairs are not necessary because public sector jobs are low bid. [#27]

Streamlining or simplification of bidding procedures. The study team asked business owners and representatives about their experience with bidding procedures, and whether they might benefit from streamlining or simplification.

Some interviewees supported streamlining of bidding procedure. [e.g., #7, #28, #31, #36, #37] For example:

- The white female owner of a DBE-certified consulting firm reported that there is room for improvement in streamlining bidding procedures. [#25]

- The white female owner of a DBE-certified specialty contracting firm reported that streamlining the bidding procedure would make it less time consuming, which would be helpful. [#4]

- The white female owner of a DBE-certified consulting firm supported streamlining bidding procedures, saying, "Yes … Cultural Resources has become cumbersome …." [#29]

- On the subject of streamlining bidding procedures, The Native American female owner of a DBE-certified supplier said, "Notification is the big thing and I think we can handle it from there on out." [#19]

However, many firms reported that bidding procedures are already streamlined and do not need further simplifications. [e.g., #6, #10, #27, #33] Comments include:

- A white male representative of a woman-owned specialty contracting firm remarked that the process is already streamlined. [#23]

- A female representative of a majority-owned heavy construction business commented that streamlining was not necessary, because procedures are very straightforward. [#15]

- A white female owner of a DBE-certified construction firm reported that the bidding procedure does not appear to be difficult and she thought it was "okay." [#30]

- When asked about streamlining, the white male owner of a consulting firm commented that the bidding procedures are not that difficult given that they have a standard procedure. [#14]

- A Native American male representative of a majority-owned specialty contractor reported that MDT has already streamlined with electronic bidding. [#5]

- A white male representative of a DBE-certified, women-owned specialty contractor commented that he thought bidding procedures were legislated, so not much change could occur. He stated, "The process works 'pretty good' the way it is." [#2]

Unbundling. Interviewees discussed advantages and disadvantages of breaking up large contracts into smaller pieces.

Many interviewees supported unbundling contracts. [e.g., #7, #26, #27, #28, #31, #38] For example:

- The white female owner of a DBE-certified specialty contracting firm reported that unbundling would be helpful. [#4]

- The white female owner of a DBE-certified specialty contracting business commented that many prime contractors are unbundling now by doing some work themselves and subcontracting work that they do not want to perform. [#3]

- The white female owner of a DBE-certified consulting firm said that unbundling would be "helpful." [#25]

- According to A white female owner of a DBE-certified construction firm, breaking up large contracts "would be wonderful." [#30]

- The Native American female owner of a DBE-certified contracting business said that unbundling might be particularly helpful for bonding purposes. [#35]

- A white male representative of a DBE-certified, woman-owned construction firm recommended that MDT break contracts into smaller pieces. [#10]

However, some business owners and representatives did not support unbundling efforts, or saw both positive and negative aspects to it. [e.g., #15, #23, #29, #33] For instance:

- When asked about unbundling, the white female owner of a DBE-certified specialty contracting business responded that it "could be helpful." However, she added that she wonders who would benefit from unbundling, the taxpayer or the state. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that unbundling would be helpful on some jobs; for other jobs, it would not be helpful. He shared that MDT currently breaks jobs up based on district. He indicated that MDT's current method works for his firm. He explained that the firm might be able to do a district job, but not a statewide job, depending upon the time of the year. [#2]

- The white male owner of a consulting firm noted that breaking up large contracts might be helpful to them. However, he could also see the advantage to keeping a large contract as a whole because the same people would be working on all of its components. [#14]

- Speaking about unbundling, the white male owner of a DBE-certified specialty contracting business supported "whatever is best for taxpayer dollars." He added that in some circumstances, unbundling could benefit a job, but it would have to depend on the job. [#17]

- The white female owner of a consulting firm reported that unbundling is good for a firm, but more work for an agency. [#21]

- When asked whether breaking up large contracts would be helpful, the white female owner of a specialty contracting business said, "I never had any issues with [a contract] being too large so, no. I kind of like the bigger ones." [#36]

Price or evaluation preferences for small businesses. The study team asked business owners and representatives to comment on price or evaluation preferences for small businesses.

Most of those who commented saw some situations where price or evaluation preferences might be beneficial. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor commented that price evaluations and small business set-asides could be beneficial, but he was unclear on the level of helpfulness as he speculated that most businesses in Montana are small. [#2]

- The white female owner of a DBE-certified specialty contracting firm remarked that it would be good for small businesses. [#4]

- The Native American male owner of a DBE-certified specialty contracting company commented that price or evaluation preferences for small businesses would be beneficial for start-up firms. [#7]

- The white female owner of a DBE-certified specialty consulting firm reported that price or evaluation preferences for small businesses make sense for any "disadvantaged businesses." [#37]

Only a few business owners and representatives, who commented, viewed price evaluation preferences for small businesses unfavorably. [e.g., #6, #10, #36]

Small business set-asides. The study team asked business owners and managers to report on small business set-asides.

Some business owners and representatives were in favor of small business set-asides. [e.g., #6, #7, #10, #32, #38] Comments include:

- When asked whether MDT should employ small business set-asides, the white female owner of a DBE-certified specialty contracting business said, "I would be for that." [#3]

- The white female owner of a DBE-certified specialty contracting firm commented that set-asides would be "great." [#4]

- The white male owner of a consulting firm stated that small business set-asides would be great if they worked. [#14]

- The white female owner of a DBE-certified specialty contracting business remarked that goals should be determined at a certain level for small businesses. [#1]

- Speaking of small business set-asides, the white male owner of a DBE-certified specialty contracting business said "I love those ideas." He added that it gives people opportunity and if it is a guaranteed set-aside, then you do not have to worry about price shopping with primes. [#17]

- When asked whether she would like to see small business set-asides, the white female owner of a specialty contracting business said, "That would be nice. That would help, I think." [#36]

A few business owners reported concern about how "small business" is defined, and the effect that has on businesses. She stated:

- The white female owner of a DBE-certified specialty contracting business indicated that she faced barriers when working in the public sector. She mentioned that one barrier is the definition of "small business." She commented that she does not consider a firm making $50 million to be small; when there are set-asides, she is competing against those large revenue firms. She added that it would be helpful to reduce the revenue cut-off for small businesses and to determine and define different sizes of small businesses. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that his firm had some issues with small business set-asides. He reported that a public agency awarded a job to a national SBA 8(a) specialty contractor, based on that specific type of designation. He expressed concern that none of the same type of specialty contractors in Montana has the SBA 8(a) designation, which eliminates them from the competition. [#2]

Mandatory subcontracting minimums. Mandatory subcontracting minimums ensure that prime contractors subcontract out at least a certain portion of a contract. Business owners and representatives reported on their related experiences.

Some interviewees supported the implementation of mandatory subcontracting minimums. [e.g., #4, #7, #26, #29, #34, #36] for example:

- The white female owner of a DBE-certified specialty contracting business stated that mandatory subcontracting minimums "would be great." [#3]

- A white female owner of a DBE-certified construction firm responded that she had not heard of mandatory subcontracting minimums, but they would be "kind of cool" and would give smaller firms the opportunity to do work. [#30]

- When asked about mandatory subcontracting minimums, the white female owner of a DBE-certified consulting firm said, "That would certainly help us." [#33]

Some interviewees reported that they were ambivalent about mandatory subcontracting minimums. [e.g., #10, #11, #15, #23, #28, #35, #41] Comments include:

- The white female owner of a DBE-certified consulting firm was not sure if mandatory subcontracting minimums would be helpful. [#25]

- The Native American female owner of a DBE-certified supplier was unsure whether mandatory subcontracting minimums would be good. [#19]

- On the subject of DBE subcontracting goals, a white male owner of a majority-owned construction firm stated, "My thoughts on things like that are I hate to see somebody subsidized who can't cut the mustard." [#13]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that, although he does not like restrictions, he concluded that DBEs should be included in bids. However, he added that mandatory subcontracting minimums are not good for the state. [#22]

Formal complaint and grievance procedures. Business owners and representatives shared their thoughts and experiences about formal complaint and grievance procedures.

Some firm representatives and owners related experiences they had with MDT's formal complaint and grievance procedures. For instance:

- The Native American female owner of a DBE-certified contracting business reported that the formal complaint and grievance procedures are "fine," though they can be a little slow. [#35]

- A Native American male representative of a majority-owned specialty contractor reported that the firm filed a complaint this year over a money dispute. He added that the procedure went well. [#5]

- The white female owner of a DBE-certified specialty contracting business reported that on one job she filed a complaint regarding an out-of-scope issue. She filed the complaint with various levels of State staff and followed the chain of command ultimately to the head of MDT. [#3]

  The same interviewee reported that, at the time of filing, the complaint was a huge barrier for her firm. She indicated that until resolution, the grievance process was frustrating adding that there were people in charge who should not have been in charge. When asked if MDT was receptive to her grievance, she reported that her frustrations were with the lowest level of state workers. Favorable results occurred as she moved up the chain of command. [#3]

Some firms had little knowledge of or experience with formal complaint and grievance procedures. [e.g., #2, #4, #6, #7, #11, #38] For example:

- A white male representative of a woman-owned engineering firm reported that he had "no idea" about formal complaint and grievance procedures. [#28]
- A white male owner of a majority-owned specialty contracting firm reported that he and his firm have no experience with MDT's formal complaint and grievance processes. [#41]
- The white female owner of a DBE-certified consulting firm commented that MDT's formal complaint and grievance procedures are in place, but she has never used them. [#25]

Several business owners and business representatives supported having established complaint procedures. For example:

- The Native American female owner of a DBE-certified supplier said that formal complaint procedures "might be helpful." [#19]
- The white female owner of a DBE-certified specialty consulting firm reported that formal complaint procedures are "essential" for any public agency. [#37]
- On the topic of formal complaint procedures, the white female owner of a DBE-certified specialty contracting business reported that "it would be awesome if someone listened to you." [#27]
- A white female owner of a DBE-certified construction firm indicated that she thought formal complaint and grievance procedures would help, as would a "comment box." [#30]

Some firms showed skepticism as to the effectiveness of MDT's formal complaint and grievance procedures. Comments include:

- The white female owner of a specialty contracting business stated that she always dealt with her problems on the jobsite; she did not go to anyone else. [#36]
- A white male representative of a woman-owned specialty contracting firm stated that formal complaint and grievance procedures are not necessary. [#23]
- The white female owner of a DBE-certified design firm reported that "anonymous" procedures are difficult to achieve. [#26]

Access to information. A few business owners and representatives emphasized the importance of accessing information. Examples include:

- A white male representative of a majority-owned engineering firm reported that they use the MDT library, which is helpful and easy to use. [#11]

- The Native American female owner of a DBE-certified consulting firm stated that if small businesses were not aware of the different places that can help, then it would be challenging. She added, "As a small business, you don't know what you don't know," because the "unknown" is hard to learn. [#18]

- Although she may not yet be fully aware of all that is available to small businesses, the white female owner of a DBE-certified consulting firm recommended improving access to information regarding the contracting process. [#24]

K. Insights Regarding the DBE Program

Business owners and business representatives commented on race- and gender-based measures that MDT or other public agencies use, including the Federal DBE Program and other business support. Part H includes:

- Experience with the DBE Program;

- Experience with other small business programs;

- Differences without DBE goals;

- MDT monitoring and enforcement of its programs;

- DBE "fronts" or fraud;

- False reporting of DBE participation or falsifying good faith efforts; and

- Effects of DBE contract goals on other businesses.

Experience with the DBE Program. Business owners and representatives discussed their experiences with the DBE Program.

Many spoke of DBE Program success; some reported on benefits and that it increases awareness of small and minority- and woman-owned businesses. [e.g., #26, #38, #36] For example:

- In general, the white female owner of a DBE-certified consulting firm reported that DBE programs are "… helpful to small businesses …." [#25]

- A Native American male owner of a DBE-certified consulting firm remarked that the DBE Program is doing a "great service" to the construction industry. [#6]

- A white male representative of a woman-owned specialty contracting firm reported that the DBE Program was helpful enough so they continued to recertify every year. [#23]

- The white female owner of a DBE-certified specialty contracting firm reported that the DBE Program gives her firm more bidding opportunities and provided training for her on her website. She added that MDT and DBE Program administrators do a great job. [#4]

- A white female owner of a DBE-certified engineering and consulting firm stated that the DBE Program has been excellent. She and her partner made sure to exploit the maximum possible benefits. They took classes, used MDT's reimbursement program for DBEs; and went to "meet and greets." The DBE Program also paid for their website and provided other technology training. [#34]

- The white female owner of a DBE-certified specialty contracting business commented that when DBEs face challenges, DBE Program staff is very helpful. For example, when approached by a prime to change its bid, program staff helped the firm retain its full subcontracting portion of the contract. [#3]

- The Native American female owner of a DBE-certified consulting firm stated that in the last six to ten years, MDT has stepped up how they help small businesses. She also mentioned that as a DBE there are some funds allocated for business owners to travel and attend training and seminars. She commented that this was a problem for her before because it had cost her time and money to attend seminars. [#18]

- The Native American male owner of a DBE-certified specialty contracting company reported that the DBE program helps with awareness and information on jobs whether subbing or priming jobs. [#7]

- The white female owner of a DBE-certified consulting firm reported that the DBE status is an advantage to minority firms in the public sector securing prime contracting opportunities and without this status, she believes that minorities would struggle. [#29]

- A white male representative of a majority-owned engineering firm reported that DBE benefits extend beyond opportunities with MDT, as there is a good system in place to raise the profiles of certified firms. He explained that the BNSF railroad is not required to use DBE firms. However, when teams assemble for work, BNSF encourages DBE utilization. He added that this creates some advantage for certified firms. [#11]

A few reported limited benefits from being DBE-certified. For example:

- The Native American male owner of a DBE-certified specialty contracting company indicated that early on, working on a subcontract for an MDT roadwork project was a "tough go" for the firm, because two MDT representatives told him that they do not believe in DBEs. [#7]

- The white male owner of a DBE-certified specialty contracting business reported that his firm is largely unsuccessful as a subcontractor; there is a stigma with his DBE label. "Oh, it's one of those businesses, it must be a 'woman-owned business,'" so when his firm tries to procure subcontract work they do not succeed. [#17]

- A white male representative of a DBE-certified, woman-owned specialty contractor commented that the successfulness of the DBE program is a "grey area." He added that the firm has had no success in gaining work with MDT; however, training has been helpful. [#27]

- A white female owner of a DBE-certified specialty contracting company reported that they have only completed one job for MDT. She explained that the firm rarely works in the public sector anymore because of less opportunity as DBE goals are no longer mandatory. [#40]

- A white female owner of a DBE-certified specialty contracting business stated that being a DBE and a woman-owned business is an afterthought; it comes down to "low bid" and that is what is going to get the firm a job. [#32]

Several interviewees commented that there was room for improvement in DBE Program especially in regards to DBE goal setting. Comments included:

- The white female owner of a DBE-certified specialty contracting business commented that it would be helpful to add DBE goals. [#3]

- The white male owner of a DBE-certified specialty contracting business noted that he hopes for higher percentage goals and greater accountability for DBE goal programs. [#17]

- The white female owner of a DBE-certified specialty contracting business reported that she wished that there were more goals on highway construction jobs. [#3]

- The white female owner of a specialty contracting business said, "I liked it when they had the goals program …." [#36]

- The white female owner of a DBE-certified consulting firm reported that their business "gets lost in the shuffle in the list of DBEs," so while the list is potentially helpful, it has not helped them yet. [#33]

- A white male representative of a majority-owned engineering firm reported that every time they get a contract from MDT, the goal is zero, and he wonders under what circumstances would there be goals. He stated that the firm has never been required to or asked to use DBE firms. He added that he would prefer an agency ask him to include DBEs rather than force the inclusion of DBEs. In addition, he commented that "somebody" is tracking DBEs, because the firm must report the amount paid to DBEs on their invoices. He commented that he would like feedback on whether they are meeting MDT's overall industry DBE goals. [#11]

- The Native American female owner of a DBE-certified supplier reported that she cannot get a response from the DBE office when she attempts to contact them and she does not know why, but that it is possibly a "break down of communication." [#19]

- The Native American female owner of a DBE-certified contracting business stated, "… if they're going to have a DBE program then maybe use it [DBE goals]." [#35]

- A white male representative of a DBE-certified, woman-owned specialty contractor said: "Enforce DBE requirements or get rid of them." [#27]

- The white male owner of a DBE-certified specialty contracting business recommended that MDT hire the DBEs themselves and not use the primes. "If you want the work done, hire the DBEs …." [#17]

Experience with other small business programs. A few interviewees had comments regarding other programs they had experienced.

Some reported experience with the federal SBA 8(a) program. Comments included:

- A white male representative of a DBE-certified, women-owned specialty contractor reported using SBA programs; he stated, "That is how we got bonding …. They helped with the loan process too." [#2]

- The white female owner of a DBE-certified specialty contracting business reported that she participates in the federal SBA 8(a) program. [#3]

- The white female owner of a DBE-certified design firm reported that five years ago her local municipality recommended that her firm become SBA 8(a) certified. She added that with that certification, the federal government must set-aside work and award it to certified firms. She added that after going through the long process to become SBA 8(a)-certified, opportunities were limited. [#26]

- A white female owner of a DBE-certified construction firm explained that back in 2012, she was unable to acquire SBA 8(a). When she still reapplied for it and she got in, she commented, "The opportunities are endless." [#30]

Others indicated general knowledge of other available programs. For example:

- A Native American male owner of a DBE-certified consulting firm reported that he believes the Montana Business Professionals of America (Montana BPA) has a tribal goals program. [#6]

- The white female owner of a DBE-certified consulting firm mentioned that there are programs that support WOSBs (women-owned small businesses), but they are not very effective for individuals in her discipline. [#33]

Differences without DBE goals. The study team asked firms whether firms noticed any difference when MDT discontinued setting DBE contract goals on federally-funded construction contracts.

Some business owners and representatives remarked that they saw a drop in work after the DBE goals discontinued. Comments include:

- The white female owner of a specialty contracting business indicated receiving significant help when MDT had DBE goals in place. [#36]

- The white female owner of a DBE-certified specialty contracting business indicated that she gets less work without goals. [#3]

- The Native American male owner of a DBE-certified specialty contracting company indicated that, in the absence of goals, his firm received a lot less calls. [#7]

- A white male owner of a SDVOSB-certified engineering firm reported that he is aware of women-owned firms that started, but then support dropped and they lost their businesses. [#9]

- A white female owner of a DBE-certified specialty contracting company reported that when her firm first became certified, they received a lot of public sector work because of the DBE goals requirement; when this was no longer a mandatory requirement, they found the private sector to be more profitable. [#40]

- Speaking on the difference after DBE goals were canceled from federally-funded projects, a white male representative of a woman-owned specialty contracting firm stated, "We really noticed it … we always had that advantage when we were a DBE." [#23]

- The white female owner of a DBE-certified design firm reported that in 2005, MDT consulting projects had goals and hired her firm under those goals. However, this had a negative impact on her firm when goals were set to zero. [#26]

- The white female owner of a DBE-certified consulting firm reported that it was difficult to get MDT to hire the firm as a DBE when DBE goals discontinued. [#29]

- A white female owner of a DBE-certified specialty contracting company reported that the decision to make DBE goals non-mandatory made finding work more difficult for her firm; she now has to compete with larger companies with better equipment that are able to complete jobs at a lower cost. [#40]

Not all Interviewees experienced the change the same way. One majority-owned firm reported greater DBE participation when goals discontinued. He commented:

- A white male representative of a majority-owned specialty contracting business remarked that the firm had difficulties with the bidding process when MDT had DBE goals; he reported greater DBE participation in projects without goals imposed by MDT. [#5]

MDT monitoring and enforcement of its programs. Some interviewees had comments regarding MDT's enforcement of its DBE program.

A few felt that MDT did a good job monitoring and enforcing the DBE program. [e.g., #38] For example:

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that MDT is "good and tough" with its monitoring of primes and DBEs. [#22]

A few business representatives were critical about key aspects of the implementation of the Federal DBE Program. For example:

- A white male representative of a majority-owned specialty contracting business reported that the firm experienced unfair treatment when a DBE subcontractor underperformed on a project. [#5]

- A white male representative of a DBE-certified, woman-owned specialty contractor reported that that MDT claims to enforce goals, but does not. [#27]

DBE "fronts" or fraud. Several interviewees commented on "fronts" or fraud. Some gave first-person accounts of instances they witnessed. Comments include:

- A white male owner of a majority-owned specialty contracting firm reported that he is aware of instances where husbands arrange for their wives to own 51 percent of the company just to achieve DBE certification, even though the wives have no real involvement in the business. [#41]

- A respondent from a woman-owned consulting firm indicated experiencing "discrimination for being a non-DBE company." She reported "collusion by DBE competitors who are either married and/or partners with multiple other DBE companies, DBE's hiding assets in net worth reports …." [#AI237]

- A white male representative of a DBE-certified, women-owned specialty contractor reported seeing a few "front" companies over the years, but he does not think they are prevalent. When the DBE Program first started, he reported observing firms launching their own DBE firms to meet goals. [#2]

  He indicated still seeing "fronts" for small business set-asides; he said, "We try to not work too often with what we call a 'suitcase company, briefcase company' … a company that … really isn't a contractor, they just administrate the contract." [#2]

Some DBEs reported no experience with fronts or fraud. [e.g., #1, #3, #7, #25, #37]

False reporting of DBE participation or falsifying good faith efforts. When MDT set DBE contract goals on certain projects, prime contractors could meet the goals through subcontracting commitments or showing good faith efforts to do so. The study team asked business owners and managers if they knew of any related issues.

Several DBE subcontractors reported having been included in a prime's winning bid, but not receiving any work from that prime. For example:

- A white female owner of a DBE-certified engineering and consulting firm reported that the DBE program was troublesome when primes would include her firm in order to land a contract and then do the work internally. [#34]

- When asked if primes (she had bid with) had ever not given her firm work once they win the bid, the white female owner of a DBE-certified specialty contracting business indicated that it happens often. She added that she has been lowest bid, but did not get the work because the prime decided to do the work themselves. [#3]

- The white female owner of a DBE-certified design firm reported that as a DBE, the firm has been on many teams with large firms looking to fulfill requirements or show good faith efforts towards requirements. Many times, once a large firm secures the contract, they do not utilize the DBE as part of the team. She added that the large firms decide to do the work internally or intended never to use the services of a DBE in the first place. [#26]

Some Interviewees reported abuse of good faith efforts. [e.g., #27] For example:

- When asked if there was abuse of the good faith effort process, the Native American female owner of a DBE-certified contracting business replied, "I'm sure there's a little bit of that." [#35]

- A white female owner of a DBE-certified construction firm reported incidences of larger firms obtaining a contract specifying that they need to hire a DBE and they did not use a DBE. She added that the firms will call and leave a message and that is their attempt to hire a DBE firm. [#30]

- When asked about false reporting or abuse of good faith efforts, a white male representative of a DBE-certified, women-owned specialty contractor said, "I have 1,600 emails this year … from prime contractors requesting prices, and it's on stuff [that we don't do], and there's no way we're going to bid the job …. We get them for jobs in Texas and New Mexico …. We've never gone there …. They're just sending bid requests out to every DBE in the country." [#2]

Most of those interviewed reported no knowledge of any false reporting. [e.g., #1, #4, #6, #8, #9, #19, #22, #23, #25, #28, #29, #38, #39, #33, #35, #36, #40, #TO2] For example:

- The Native American male owner of a DBE-certified specialty contracting company reported that he had not experienced any false reporting. He noted that he had only heard "rumors" about false reporting occurring. [#7]

Effects of DBE contract goals on other businesses. Some business owners and managers provided insights on the impact of DBE project goals on non-certified firms.

Some firms reported possible negative effects from DBE contract goals on non-certified firms. Comments on the subject include:

- The white female owner of a DBE-certified design firm stated, when asked if there were any negative effects of DBE contract goals on non-DBE businesses, "Oh, I think there could be." [#26]

- When asked if there were any negative effects of the DBE program on non-DBE firms, the white female owner of a specialty contracting business responded that it might be difficult in the beginning but once a firm is established, there is not as much of an issue. [#36]

- A white male representative of a woman-owned engineering firm commented that if there are set-asides then it is obvious that it could negatively affect uncertified firms. [#28]

- The white male owner of a consulting firm reported that he has seen minority-owned businesses do quite well because they were minority-owned. "I can't compete with that … sometimes that seems a little unfair … I just want a level playing field …." [#14]

- A white male owner of a majority-owned specialty contracting firm reported that his firm has missed job opportunities in the past, even with their positive reputation and the fact that they were the lowest bidder. He went on to indicate that when primes are looking to fulfill DBE contracting goals, they look past his firm's qualifications and see only that he is not a certified DBE. [#41]

Many indicated no effects on businesses ineligible for the program. [e.g., #3, #8, #9, #15, #19, #23, #25, #35, #38, #39, #TO2] For instance:

- When asked if there were any negative effects of DBE contract goals on non-DBE businesses, the white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported, "Not so much anymore." [#22]

- A white female owner of a DBE-certified specialty contracting company commented that there are no negative effects of the DBE Program on non-DBE firms aside from the fact that some firms are ineligible for the certification. She indicated that if they are ineligible, they are likely to have not benefited in the first place. [#40]

- A white male representative of a DBE-certified, woman-owned specialty contractor commented that it is a perception that DBEs takes advantage of the system. He added that there is no disadvantage or advantage of not being eligible for the program. [#27]

L. Insights Regarding DBE Certification

Business owners and managers discussed the process for DBE certification, including comments related to:

- Experience with DBE certification;
- Ease or difficulty of becoming certified;
- DBE recertification; and
- Advantages and disadvantages of DBE certification.

Experience with DBE certification. Some interviewees discussed their level of understanding about certifications.

Awareness of certification. Business owners and representatives reported on how their firms learned about certification, for example:

- The Native American male owner of a DBE-certified specialty contracting company reported encouragement by Montana to certify as a DBE. [#7]
- The white female owner of a DBE-certified specialty contracting business reported that she found out about DBE certification through a merchant's association. [#1]
- The white female owner of a DBE-certified specialty contracting firm reported that she first learned of certification from a large contractor. [#4]
- A Native American male owner of a DBE-certified consulting firm reported that he learned about certification through the Lake County Community Development Program. [#6]

Ease or difficulty of becoming certified. A number of interviewees commented on how easy or difficult it was to become certified.

A few interviewees reported that certification was relatively easy for them. Some commented that, despite the overall ease of certification, the amount of paperwork was still excessive. For instance:

- The Native American female owner of a DBE-certified supplier commented that it was very easy to become certified. [#19]
- The Native American male owner of a DBE-certified specialty contracting company reported that other than there being a lot of paperwork involved, the certification process was very easy. [#7]
- A white female owner of a DBE-certified specialty contracting business reported that certification was an easy process. [#32]

- The white female owner of a DBE-certified consulting firm indicated that it was easy to become certified; individuals involved with the paperwork were very helpful. [#24]

- The white female owner of a specialty contracting business commented that the process was manageable and thorough. [#36]

- Commenting on the DBE certification process, the Native American female owner of a DBE-certified contracting business mentioned that it was not difficult. She added that for firms that seek certification for the first time as a DBE, it is "daunting" because of the amount of paperwork involved. [#35]

- A white female owner a DBE-certified engineering and consulting firm reported that the certification process went smoothly for her firm, although there was a lot of paperwork involved. [#38]

- The white male owner of a DBE-certified specialty contracting business responded that certification was time consuming but not necessarily difficult. [#17]

- When asked about the ease or difficulty of becoming certified, a white female owner of a DBE-certified specialty contracting company described the certification process as "manageable." She went on to indicate that re-certification is now easier, saying, "… before you had to fill out the same information and prove all these things [again] …." She added that now, firms are able to report that none of their business information has changed. [#40]

- The white female owner of a DBE-certified design firm reported that MDT's DBE certification was "straight forward." However, she added that the amount of paperwork and information requirements surprised her. She reported that when she got her reciprocal Interstate DBE Certification in another state it was seamless and easy. [#26]

Many interviewees reported difficulties or other issues with the DBE certification process. Some interviewees indicated that the certification process was time-consuming or difficult. For example:

- The white female owner of a DBE-certified consulting firm reported that the DBE certification process was involved and time consuming. [#25]

- The white female owner of a DBE-certified specialty contracting firm reported that the process was long and challenging and required months to locate and complete all of the required paperwork. [#4]

- Commenting on the DBE certification process, a white male representative of a woman-owned specialty contracting firm said "It was kind of a pain ... [doing the] paperwork and refiling every year." [#23]

- The white female owner of a DBE-certified consulting firm stated the certification process was difficult for her because it required information she did not know how to "put together" or did not have available. She added that now she is certified and she only has to renew annually, it is "fairly simple." [#33]

- A white female owner of a DBE-certified construction firm commented that the amount of paperwork they needed for certification was difficult. He suggested it would be nice if a person could go through the process entirely online instead of mailing in their documentation. [#30]

- A Native American male owner of a DBE-certified consulting firm responded that the initial certification was "too much." However, he knew there was a need to prevent fraud. He added that recertification is not bad. [#6]

- A white female owner of a DBE-certified engineering and consulting firm reported that the certification process was painful because many of the questions seemed geared toward firms that produce widgets and not consulting firms. She suggested that it might help to have a different certification process for consulting firms. [#34]

- The white female owner of a DBE-certified specialty contracting business reported that the process of becoming certified was difficult, but the information provided on the subject was pertinent. A white male representative of the same firm recommended hiring more MDT DBE staff in Helena to make the process more efficient. [#27]

- A white male representative of a DBE-certified, women-owned specialty contractor expressed that the certification process is time consuming. He mentioned that when the firm first certified, there were challenges. He said, "When we first got certified … there [were] a lot of challenges…. Anytime … a DBE comes into their little niche in the industry … they question it …. Not only you 'gotta' turn in your stuff, then you got to defend it …. that the person you say is running [the business] is actually … involved …. No company of any size has one person run every aspect of the company. So you know you got to defend [your own firm as a DBE] a lot [to the prime or agency]." [#2]

Some said that their initial experience with certification was difficult, but that recent experiences were easier. For example:

- The white female owner of a DBE-certified consulting firm reported that at first certification was time consuming. She added that collecting data and interpreting meaning in the process was challenging. She noted that once a firm certifies in one state, it makes certification in other states easier because the firm has a template for the certification process. [#29]

- The white female owner of a DBE-certified specialty consulting firm reported that when her firm first became certified, it was "quite a process." She went on to say that there was a lot of paperwork, but indicated that it has become easier over the years. [#37]

- The Native American female owner of a DBE-certified consulting firm responded that the first time she certified, it was difficult, though recently when she recertified, it was easier and the process had improved. She added that it could be easier for her this time because her firm gained recognition in the community. [#18]

- The white female owner of a DBE-certified specialty contracting business reported that certification was difficult at start, but recertification is easier. She commented that while filing the original certification application, she called the DBE Program administrators often; they were helpful. She added that since the process is now online, it is easier. [#3]

DBE Recertification. Business owners and business representatives discussed their experiences with re-certifying.

A few firms reported that recertification is relatively easy. [e.g., #4, #6, #33] Comments include:

- The Native American male owner of a DBE-certified specialty contracting company commented after the initial certification and gathering all of his information, the recertification process was simple. [#7]

- A white female owner of a DBE-certified engineering and consulting firm commented that the re-certification process was not bad at all. [#34]

- The Native American female owner of a DBE-certified contracting business stated that the recertification process was easy. [#35]

However, some interviewees reported that, due to the paperwork and lack of DBE goals, they had considered not recertifying. For example:

- A white male representative of a DBE-certified, women-owned specialty contractor reported that the zero goals and paperwork could stop his firm from recertification. He reported staying in the program "as a service to the prime contractors … I don't know if that helps us or not. I really don't know." [#2]

- A Native American male owner of a DBE-certified consulting firm reported that he almost hesitated in recertification this year because of the paperwork and lack of DBE goals, but decided to recertify in order to keep access to the training opportunities of the DBE program. [#6]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor mentioned that recertifies annually. He added that it is frustrating collecting financial statements and other documents. He further added that in the past, the process was loose; now it is better. He also noted that assistance is available to answer questions. [#22]

- The white female owner of a DBE-certified consulting firm commented that the renewal process is challenging. She suggested the process be electronic. [#25]

- A white male representative of a DBE-certified woman-owned contractor reported that discontinuance of DBE contract goals affected the decision not to re-certify. [#31]

Advantages and disadvantages of DBE certification. Interviews included broad discussion of whether and how DBE certification helped subcontractors obtain work from prime contractors.

Many of the owners and managers indicated advantages to certification, noting that certification helped them obtain work or build skills and knowledge. [e.g., #3, #20] For example:

- A white female owner of a DBE-certified engineering and consulting firm stated that being a DBE sometimes got their foot in the door and got them on the list. [#34]

- The white female owner of a specialty contracting business reported that DBE certification helped a lot in the beginning to get the contracts she needed in order to get started. [#36]

- The white female owner of a DBE-certified specialty contracting firm reported that an advantage during the bidding process is that certified firms can list their certification status to increase opportunities. The DBE Program has helped her obtain work. [#4]

- The Native American male owner of a DBE-certified specialty contracting company reported that an advantage to certification is access to information on upcoming projects and goal requirements. In addition, being on DBE lists for primes to reach out to is helpful. He reported that he also advertises his firm as a DBE. [#7]

- The white male manager of a DBE-certified, Asian-Pacific American-owned specialty contractor reported that the DBE program was helpful in the firm's early days. It helped the firm to secure work. [#22]

- The white female owner of a DBE-certified consulting firm reported that the DBE Program is helpful saying, "It does introduce me to prime contractors … to engineering firms … for my business, it has been critical." [#29]

- The Native American female owner of a DBE-certified consulting firm reported that the seminars have been helpful although she is still new to "how things work." [#18]

- The white female owner of a DBE-certified specialty contracting business said that the DBE Program brought her awareness of social media and new technology. She added that without certification she would not have been privy to the classes. [#1]

- The white male owner of a DBE-certified specialty contracting business reported that the DBE Program helped with the funding for his firm's website and introduced him to the DBE focus group. [#17]

- A white female owner of a DBE-certified construction firm indicated that the DBE Program has not been helpful as far as projects, but regarding resources, it has been helpful. She attended seminars and used the reimbursement program. [#30]

- A white female owner of a DBE-certified specialty contracting business stated that being a DBE has advantages for their firm. She added that they appreciate the opportunities to attend seminars and network, and the reimbursement for legitimate expenses. [#32]

- When asked about the advantages of certification, a white female owner a DBE-certified engineering and consulting firm reported that they receive helpful training and notifications for job opportunities; she went on to say that the reimbursement program has been beneficial to the firm as well. [#38]

- The white female owner of a DBE-certified consulting firm reported that she appreciated the reimbursement, which covered professional memberships and networking. [#33]

- When asked if the DBE program has been helpful, the white female owner of a DBE-certified specialty consulting firm stated that she considers the reimbursements to benefit her firm the most. [#37]

A number of interviewees indicated that there are limited advantages to being DBE-certified; some attributed this to MDT having no DBE goals in place. For example:

- The Native American female owner of a DBE-certified supplier noted that the only limited benefit was that they had help setting up their website. [#19]

- A white male representative of a DBE-certified woman-owned contractor reported that they had only secured a couple of jobs due to being a DBE. [#31]

- When asked if she thought the DBE program affects the business, the Native American female owner of a DBE-certified contracting business replied that she does not see advantages. [#35]

- A white male representative of a majority-owned specialty contracting business indicated that there are few advantages to certification. He stated that many DBEs do not even advertise or disclose that they are a DBE on bids. [#5]

- The white female owner of a DBE-certified specialty contracting business stated that DBE certification or "woman-owned" does not mean anything to a private customer; and those customers assume her husband owns the business. [#1]

- A white male representative of a DBE-certified, women-owned specialty contractor reported that in absence of DBE goals, the certification advantages disappeared. He continued, "I'm not so sure anymore [of the benefits] …. There're … a lot of DBE companies …. Originally, there weren't a lot [of competitor DBEs] …. With no goals on the state jobs … there's definitely no advantage …." [#2]

- The white female owner of a DBE-certified specialty contracting business reported that the firm does not see DBE certification as an advantage when goals are not enforced. She reported that they only use the DBE Program for reimbursement and training, not for jobs. [#27]

- A white female owner of a DBE-certified specialty contracting company commented that the DBE program benefitted them more in the beginning when there were mandatory DBE goals. [#40]

M. Overall Comments and Recommendations for MDT

Some interviewees had other comments and insights for MDT related to:

- How MDT is succeeding; and

- How MDT can improve.

How MDT is succeeding. Several businesses reported ways in which MDT is succeeding, including improved communication and adoption of new technology. For example:

- The white female owner of a DBE-certified specialty consulting firm reported that MDT does a good job of engaging many different individuals, and indicated that this is beneficial to both majority-owned and DBE firms. [#37]

- A white male representative of a majority-owned engineering firm commented that the MDT's Consultant Design Bureau is doing a better job with communication. [#11]

- A female representative of a majority-owned construction company indicated that Montana seems more up-to-date than other states. For example, she commented that for primes, a lot of the bidding happens online. She commented, "I think our system works well … I think the way it is now is good." [#20]

- A white male representative of a woman-owned specialty contracting firm reported that the last few years have improved due to the information accessible online. [#23]

- A white female owner of a DBE-certified engineering and consulting firm was impressed that the administering of the 2016 MDT Disparity Study has included local participation. [#34]

How MDT can improve. A number of business owners and representatives spoke about ways in which they felt MDT could improve.

Some wanted to see more communication and interpersonal interaction. Examples include:

- Both a white male representative and a Native American male representative of a majority-owned specialty contractor commented that while they like "meet and greets," MDT has not held them recently. They recommended that MDT host these meetings at the same time and at the same central location). [#5]

- A white male representative of a majority-owned engineering firm commented that, MDT not having a Helena office makes his firm feel "out of the loop." He added that the more information and communication MDT provides, the better it is for the industry. [#11]

- A white male representative of a majority-owned engineering firm stated that MDT could improve by organizing more outreach events for DBEs and providing more information on job opportunities. [#39]

- The Native American female owner of a DBE-certified consulting firm stated that it would be helpful if there were a way for MDT to better disseminate information about opportunities, and to help businesses actually "grasp" what they need to know. [#18]

- The white female owner of a consulting firm suggested that there be an email newsletter from MDT. [#21]

Others recommended that MDT find ways to encourage bidding and award of contracts by and to DBEs and smaller businesses. Comments include:

- The Native American male owner of a DBE-certified specialty contracting company indicated that more work for smaller businesses would be an improvement. [#7]

- The white male owner of a consulting firm reported, "We just want a shot at doing some of those projects, that's all." [#14]

- A white male representative of a DBE-certified, woman-owned construction firm recommended that MDT have more set-asides for small business and certified firms, and allow them more time for bid review. [#10]

- A white male manager of a majority-owned engineering firm commented that MDT should make its selection criteria friendlier to professionals who do not have as much experience as the large firms that MDT usually hires. [#8]

- A white male manager of a majority-owned engineering firm expressed the need for MDT to pass a "huge transportation bill" so more than just the largest firms can secure work. [#8]

- The white female owner of a DBE-certified design firm commented that MDT must be careful to limit the size parameters of its projects so that businesses with less than 25 staff (microbusinesses) can realistically bid on projects as a prime. [#26]

- A white female owner of a DBE-certified engineering and consulting firm indicated that it would be good if MDT could achieve their goals with smaller contracts. She knows that many companies out there are very large, though some other agencies seem to be overcoming the obstacles to using small businesses. [#34]

- A white male representative of a woman-owned engineering firm recommended more unbundling of work. He indicated that from an engineering standpoint, obtaining work with MDT is difficult because so many contracts are "huge." He added that it is always the biggest firm that gets the contract. [#28]

- A white female owner of a DBE-certified specialty contracting business suggested that MDT "hold general contractors' feet to the fire about hiring DBEs." She added, "… if you're within a couple thousand dollars of a bid, but the company is qualified and a DBE, then hire the DBE." [#32]

- The white male owner of a DBE-certified specialty contracting business recommended that MDT boost DBE involvement. He stated, "Take some of [the contracts] out of the hands of primes and put back in-house … if you really want to meet a DBE goal, bypass the 20 percent markup or 30 percent markup that a prime is going to put on a project from their sub and just let it go direct [for more DBE participation] …." [#17]

Business owners and representatives reported a number of other unique insights as well. These included specific areas where the firms have experienced issues and general observations about the State of the Montana transportation industry. For example:

- A white male representative of a majority-owned engineering firm reported that he has an issue for the legislature; he would like laws that allow for alternative contracting other than "design-build." [#11]

- The white female owner of a DBE-certified specialty contracting business reported that lump sum payments for her line of work is a current problem. She added that currently, subcontractors must increase their bids to cover any extras that arise; as a result, primes are choosing to do the work themselves. [#3]

- When asked for any final comments or insights, a white male representative of a trade organization stated that "minimizing conflicting goals" would be an improvement for MDT's processes. He went on to reiterate that it is difficult for small businesses to compete as general contractors on MDT projects due to very demanding specifications and paperwork requirements. [#TO1]